No. [redacted]

(1)

D.C. No. CV-99-03082-CW

IN THE

SUPREME COURT OF THE UNITED STATES

HAROLD J. RUCKER - PETITIONER
(Your Name)

vs.

JOHN E. POTTER, Postmaster General of the U.S. Postal Service; et al., - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

HAROLD J. RUCKER
(Your Name)

419 Darien Avenue
(Address)

Oakland, CA 94603-2121
(City, State, Zip Code)

(510) 632-7727
(Phone Number)

33 pp

LIST OF PARTIES

PLAINTIFF:

Harold J. Rucker

DEFENDANTS:

John E. Potter, Postmaster General of the Postal Service,
William August, Postmaster of Alameda Post Office, Alameda, CA.
Warren Spencer, Supervisor at Alameda Post Office, Alameda, CA.
Laverne Pennix, Supervisor at Alameda Post Office, Alameda, CA.

STION(S) PRESENTED

1. Whether there is an alignment of the Circuit and District Courts as to how to define and classify continuing violations involving systematic discrimination that is comprised of formal and informal policies practiced by an employer to select employees for harassment or dismissal for participating in the EEOC complaint process?

2. Whether there are guidelines to align the Circuit and District Courts as to how to identify if systematic discrimination is being used by an employer to customize the workforce based upon disriminatory criteria that focuses on specific behaviour characteristics of a specific racial group and exploitive gender criteria which adversely impacts individuals of specific racial groups who are less exploitable?

3. Whether the District Court is justified in using the criteria of filing a specific number of discrimination complaints against an employer as criteria for ordering a restrictive pre-filing order against the appellant without first considering factors concerning the effectiveness of the EEOC administrative process in resolving EEO complaints at the onset and without determining if the series of complaints filed constitute sufficient evidence of continuing violations of systematic discrimination practiced by the employer?

4. Whether the Circuit and District Courts have a responsibility or duty to allow complainants the opportunity of meaningful and comprehensive discovery into their allegations of discrimination before dismissing their complaints after the Courts are apprised of the EEOC adminstrative process being compromised and/or rendered ineffective by the systematic failure of personnel of the EEOC administrative process to develop a comprehensive and complete record of the alleged discrimination by failing to interview witnesses for supporting affidavits and being informed that management used tactics to create a hostile work environment to intimidate employees thereby causing fear of repriasal from management if they provided supportive declarations of discrimination claims to fellow employees?

5. Whether the District Court was justified in dismissing a discrimination complaint without providing the complainant with an opportunity to conduct meaningful discovery where the primary theory of discrimination is depended upon evidence from the employer to demonstrate motive and intent?

6. Whether the District Court was justified in dismissing the retaliation claim when the discriminatory actions alleged demonstrate a cognizant pattern of disparate treatment used in conjunction with employment practices and policies that appeared neutral on their face.

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

Harris v Forklift Systems, Inc., 510 U.S. 17, 126 L.Ed 2d 295 4

O' Connor v Consoolidatd Coin Caretakers Corp. (1996, US) 134 L Ed 2d 4 4

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APPENDIX B DISTRICT COURT OPINION

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

☒ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 21, 2002

☒ No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(l).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____
A copy of that decision appears at Appendix _____

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

S EMENT OF THE CASE

This is a case that involves a series of disparate treatment used in conjunction with employment practices and policies to eliminate specific individuals from the workforce that fail to meet employment criteria based upon specific behaviour characteristics of a specific racial group. Employees that did not conform to the employer's established racial based criteria was systematically harassed under seemingly neutral employment practices and policies until such time that an event could be developed or orchestrated through prefabrication to dismiss the employee. O' Donnell v Heublein, Inc. (1990, ND Ill) 1990 U.S. Dist. Lexis 1263; Bruno v Western Elect. Co (1987, CA10 Colo) 829 F2d 957.

Members of management would purposely create a hostile work environment by providing incorrect and erroneous information on how to address injury claims. Management would provide negative correspondence to doctors or injury claim representatives without the claimant's knowledge or an opportunity to respond to the correspondence. Management would use disciplinary actions against the appellant without probable cause i.e. issuance of letters of warning for actions caused by managements misinformation. Management would provide erroneous information to the appellant as to how to address significant medical matters which required work restrictions. Subsequent to the appellant discovery of the true information as to how to address his medical conditions with specific medical work restrictions, management stated it will not honor the appellant's doctor's medical work restrictions. Appellant contends that management used retaliation as means of kurtailing and controlling the use of the EEOC complaint process by using unfounded acts of discipline to harass, aggravate and create a hostile work environment.

The discriminatory employment practices and policies used by management served to create a workforce of individuals of a specific racial makeup which served to eliminate the appellant for not being a member of that racial group. Appellant contends that he has been subjected to five continuous years of periodic disparate treatment since his first filing of an EEOC Complaint in 1991 until his termination in 1996. A complaint was filed for each incident of disparate treatment. Each incident was found not to be pervasive or abusive enough in and of itself to be actionable discrimination. Harris v Forklift Systems, Inc., 510 U.S. 17, 126 L.Ed 2d 295.

EST AVAILABLE COPY

STATEMENT OF THE CASE

Collectively the incidents demonstrate a designed systematic pattern of discrimination used to eliminate specific employees from the workforce for not meeting the racial profile criteria. Berry v Board of Supervisors of Louisiana State University (1986, CA5 La) 783 F2d 1270.

Appellant contends that the EEOC complaint process was consistently rendered ineffective by the lack of development of a thorough and complete record through the EEOC administrative process. Appellant also contends that collaborative declarations as to workplace discrimination was hampered by management's retaliatory policy. Appellant was not cognizant of the clandestine motive of the employer during the time that he filed his first two discriminations complaints, however after the third incident a systematic pattern began to emerge, but a motive was not determined. Elliott v Sperry Rand Corp. (1978, D.C. Minn) 79 FRD 580) The individual events of disparate treatment considered singlely was insufficient for the appellant to become aware there was an underlying motive of the employer for their disparate treatment. Crittendon v American Nat. Ins. Co., 967 F. Supp 933 (S.D. Tex 1997)

Appellant did not become aware of the motive and intent of the employer until such time that he had filed his last dicrimination complaint and discovered the motive of the pattern of disparate treatment by his ex-employer. Shehadeh v Chesapeake & Potomac Tel. Co. (1978) 193 App D.C. 326.

REASO' FOR GRANTING THE PETITION

This petition should be granted because there is insufficient decisions that guides the District Courts or the United States Courts of Appeal in recognizing and the usage of discriminatory employment practices and policies to custom design a workforce using racial criteria that favors one group of citizens over the other because of specific characteristic traits. Racial profiling in the workplace is designed to eliminate a particular groups of individuals for what appears to be work related reasons on the surface. A favoritism for one racial group of individuals over another racial group violates the very core of the Civil Rights laws. This employment practice

This petition should be granted to bring to the attention of the District Courts and the Court of Appeals the subtle factors of racial profiling in the workplace which may not manifest themselves in a single incident of alleged discrimination but should be considered over a reasonable period of time of continuous incidents of alleged discrimination. Reported incidents of discrimination should be addressed as if there is a valid reason for being reported until an complete investigation into the allegation proves otherwise.

This petition should be granted because government employees have a very limited avenue to address discrimination in the work place. In this instance the avenue to address discrimination in the work place is being compromise and rendered ineffective by the incomplete and inefficient investigative body of the EEOC administrative process. The lack of an immediate and effective administrative avenue to investigate and resolve acts of dicriminatory actions creates undue stress upon government employees and subsequently leads to abuse of the workforce by management personnel which eventually leads to numerous complaints of discrimination being filed in the court system. This Court should mandate the lower courts to address with urgency any valid allegations of the failure of the EEOC administrative process to provide a sufficient record of discrimination claims.

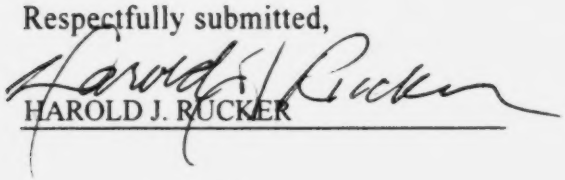
This petition should be granted because the lower courts failed to consider the factors involved in continuous violations of discrimination and failed to provide the appellant with the opportunity to define the motive and intent of the employer's discriminatory practice.

This petition should be granted because the lower court failed to corrolate the retalitory activities of the employer with the alleged acts of discrimination that serve to harass and intimidate members of the workforce to prevent their participation in the EEOC investigative process.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,



HAROLD J. RUCKER

Date: May 20, 2002

APPENDIX A

FILED

FEB 2 1 2002

CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD J. RUCKER, Plaintiff - Appellant, v. JOHN E. POTTER,* Postmaster General, Postmaster General of the U.S. Postal Service; et al., Defendants - Appellees.	No. 01-16052 D.C. No. CV-99-03082-CW MEMORANDUM**

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Submitted February 11, 2002***

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* John E. Potter is substituted for William J. Henderson, as Postmaster General of the United States Postal Service, pursuant to Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

*** Because the panel unanimously finds this case suitable for decision without oral argument, Rucker's request for oral argument is denied. *See* Fed. R. App. P. 34(a)(2).

Before: B. FLETCHER, T.G. NELSON, and TALLMAN, Circuit Judges.

Harold J. Rucker appeals pro se the district court's dismissal of his Title VII claim alleging race, color and gender discrimination in addition to retaliation. We review de novo a dismissal for failure to state a claim, *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996), and we affirm.

The district court properly dismissed Rucker's amended complaint because it failed to state a prima facie claim for discrimination due to race or gender, *see Breneman v. Kennecott Corp.*, 799 F.2d 470, 474 (9th Cir. 1986), or for retaliation pursuant to 42 U.S.C. § 2000e-3, *see Hashimoto v. Dalton,* 118 F.3d 671, 679 (9th Cir. 1997).

Rucker's remaining contentions lack merit.

AFFIRMED.

APPENDIX B

United States District Court
For the Northern District of California

FILED

MAR 27 2001

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HAROLD J. RUCKER,

Plaintiff,

v.

WILLIAM J. HENDERSON, United States Postmaster General,

Defendant.
/

No. C 99-3082 CW

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S RULE 56(f) REQUEST

Defendant William J. Henderson, United States Postmaster General, moves to dismiss or for summary judgment. Plaintiff Harold J. Rucker, proceeding pro se, opposes the motion. Having considered all of the papers filed by the parties, the Court GRANTS Defendant's motion to dismiss and DENIES Plaintiff's Rule 56(f) request for additional discovery.

PROCEDURAL BACKGROUND

This is the fifth complaint Plaintiff has filed against Defendant arising out of his employment with the United States

Postal Service (USPS).[1] In this complaint, filed on June 26, 1999, Plaintiff alleges gender discrimination, race discrimination, age discrimination, and retaliation, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., the Rehabilitation Act, 29 U.S.C. §§ 791 and 794, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et. seq.

On October 4, 1999, Defendant filed a motion to dismiss this complaint and case no. C 99-3107 CW on grounds of res judicata and collateral estoppel, to stay discovery, and to restrict Plaintiff from filing further claims against Defendant, the USPS, or any USPS employee. In an order issued on April 26, 2000 (April Order), the Court dismissed Plaintiff's age discrimination and failure to accommodate claims on the basis of res judicata. The Court dismissed Plaintiff's race and gender discrimination claims, not on the basis of res judicata or collateral estoppel, but because Plaintiff failed to allege facts that "suggested a nexus between his supervisors' responses to his disability complaints and his gender or race." April Order at 12:7-9. The Court dismissed Plaintiff's retaliation claim because it was not possible to ascertain from the complaint the activities that formed the basis of Defendant's retaliation. See id. at 17-18. The Court granted Plaintiff leave to amend his race and gender discrimination claims that had been the subject of complaints he had filed with the Equal Employment Opportunity Commission (EEOC) on November 14, 1995, and

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[1]This complaint was originally filed as two complaints. The second complaint, case number C 99-3107 CW, was dismissed as duplicative.

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May 17, 1996 "to allege with particularity a factual connection between the actions of his supervisors and his gender or race, if he truthfully can make such allegations." Id. at 12:17-22. The Court also granted Plaintiff leave to amend his retaliation claim to "specifically identify the opposition or enforcement activities that form the basis for the alleged retaliation against him, and identify with particularity the timing and nature of the allegedly retaliatory acts taken against him as a result of those activities." Id. at 18:15-21. The Court indicated to Plaintiff that if he failed to allege the necessary factual basis to support his claims of employment discrimination and retaliation, his amended claims would be subject to dismissal with prejudice. The Court further granted Defendant's motion to stay discovery pending a motion to dismiss the amended complaint, and to restrict Plaintiff from filing further actions against Defendant without first obtaining leave of the Court.

On May 22, 2000, Plaintiff filed his first amended complaint (FAC). On August 7, 2000, Defendant filed the instant motion to dismiss Plaintiff's FAC or for summary judgment based upon evidence contained in the record of Plaintiff's two EEOC cases.

RELEVANT FACTUAL BACKGROUND

Plaintiff is an African-American male. On May 14, 1991, Plaintiff began to work for the USPS as a letter carrier in the city of Alameda, California.

The following facts are as alleged in Plaintiff's complaint and being taken as true for the purposes of Defendant's motion to dismiss. On September 22, 1992, Plaintiff filed a complaint with

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the Equal Employment Opportunity Commission (EEOC) (1992 EEO complaint), Office of Federal Operations (OFO) against his supervisor Carolyn Seaberry for allegedly calling him a "dumb ass man," and for creating an unacceptable and intolerable work environment. See FAC ¶¶ 34 and 154. On June 22, 1995, the OFO remanded the complaint back to the USPS for processing. See id. ¶ 34. On July 24, 1995, William W. Norris, USPS Acting Appeals Review Examiner/Analyst in San Bruno, California issued a "Remand Acceptance Letter" addressed to Plaintiff, indicating that Plaintiff's discrimination complaint was accepted by the USPS for investigation. See id. ¶¶ 35 and 157, Pl.'s Ex. B. Plaintiff claims that this action on his 1992 EEO complaint is what precipitated the retaliation taken against him. Plaintiff alleges that the individuals who retaliated against him knew of the OFO remand letter because USPS Postmasters and supervisory personal recognize by name or face the EEOC investigators who are members of the permanent staff. See id. ¶ 169. Even if the Postmaster or supervisory personnel do not recognize the EEOC investigator, the EEOC investigator must identify him or herself to USPS management and must also identify the nature of his or her investigation and who he or she is there to interview. See id. ¶ 170.

In 1993, Plaintiff filed a second EEO complaint, which stemmed from Defendant's failure to hire Plaintiff for a GS-9 electronic technician position (1993 EEO complaint). See id. ¶ 160. The EEOC issued a right to sue letter, and on December 15, 1994, Plaintiff filed case number C 94-4299 CW, one of his earlier suits in this Court. See id. ¶ 174. Plaintiff claims that this complaint is

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also part of the reason for the alleged retaliation against him.

In November, 1994, Plaintiff began experiencing pain in his neck and shoulders. See id. ¶ 12. On January 13, 1995, Plaintiff was seen by Dr. Hussam El-Gohary, a physiatrist at the Readicare Medical Center, USPS' contracted medical facility, who became Plaintiff's treating physician. See id. ¶¶ 17, 21, 38. Dr. El-Gohary prescribed therapy and recommended modified work. See id. ¶¶ 22 and 23. Plaintiff was assigned to sort undeliverable bulk mail and could take breaks as necessary to avoid the onset of muscle tension. See id. ¶ 23. Plaintiff could not continue to sort undeliverable bulk mail because the inhalation of dust while sorting caused him to have an allergic reaction. See id. ¶ 24. He also continued to have pain in his neck and shoulders. See id. ¶ 25. On May 2, 1995 Plaintiff was seen by Dr. Robert Ansel, a neurologist, upon referral from Dr. El-Gohary. See id. ¶ 26.

On June 28, 1995, Plaintiff was seen by Dr. Allan Halden, an orthopedic surgeon. See id. ¶ 36. Dr. Halden's medical findings were, in part: "The claimant's physical limitations resulting from work related disability consist mainly of an inability to tolerate jobs of a repetitive nature with the same motions being done over and over again for hours at a time. This includes repetitive motions of the neck, arms and shoulders such as casing or other sorting of mail or prolonged reading as he presently is doing reading postal manuals." Id. ¶ 37.

On July 21, 1995, Plaintiff was informed that Dr. El-Gohary had issued a report in which he released Plaintiff to return to his full mail sorting duties. See id. ¶ 39. Unknown to Plaintiff,

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Supervisor Warren Spencer and Postmaster William August had discussed Plaintiff's medical condition with Dr. El-Gohary and they had influenced Dr. El-Gohary to place Plaintiff back on full duty. See id. ¶ 39. Plaintiff was assigned to regular work duties, but Plaintiff experienced the same symptoms and told Supervisor Spencer that he could not continue working due to the pain. See id. ¶ 40. Supervisor Spencer told Plaintiff that he was cleared by his treating physician to engage in his normal work activities and he would have to obtain medical verification from his treating physician for work restrictions. See id. ¶ 41. That same day, Plaintiff saw Dr. El-Gohary, who referred Plaintiff for an MRI examination, but who continued to indicate that Plaintiff could work at full duty with no restrictions. See id. ¶ 43. When Plaintiff returned to his job site, Supervisor Spencer sent Plaintiff home and told him not to return to work until he provided medical documentation regarding his restrictions. See id. ¶ 46.

On August 26, 1995, Plaintiff received a certified letter from Supervisor Spencer in which Spencer stated that Plaintiff was absent without leave (AWOL) and would be removed from the postal service if he did not provide satisfactory information regarding his absence. See id. ¶ 59. On August 28, 1995, Plaintiff returned to work. See id. ¶ 60. Supervisor Spencer was on vacation. See id. ¶ 60. Plaintiff was assigned to his regular duty of casing mail. See id. ¶ 62. Plaintiff attempted to explain his medical situation to Postmaster August, but Postmaster August refused to listen, stated that Plaintiff's doctor had cleared him for full duty and ordered Plaintiff to go back to work. See id. ¶ 61.

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Postmaster August watched Plaintiff as he worked. See id. ¶ 62.

On August 30, 1995, Plaintiff experienced severe muscle spasms that caused him to take an unscheduled break. Supervisor Munoz ordered Plaintiff to return to casing mail. When Plaintiff told him that he could not continue working, Supervisor Munoz insisted Plaintiff take sick leave, which Plaintiff did. See id. ¶ 66. On September 8, Plaintiff submitted a written request to Postmaster August to be assigned to restricted duty. Postmaster August denied this request. See id. ¶ 67. On September 15, 1999, Plaintiff told Supervisor Spencer that he could not do his job due to the pain in his back and shoulders. See id. ¶¶ 78 and 79.

On October 4, 1995, Plaintiff was examined by Dr. Wesley Watkins, who diagnosed Plaintiff with a left trapezial strain. See id. ¶ 104, Pl. Ex. N. On a work status report, Dr. Watkins recommended that from October 4, 1995 to October 10, 1995, Plaintiff could participate in modified work with certain restrictions. See id. On the work status report, Dr. Watkins indicated Plaintiff was to see him for follow-up care on October 10, 1995. See id. On October 12, 1995, Supervisor Lavern Pennix told Plaintiff that the documentation from Dr. Watkins was not acceptable and that his order for restricted work duty would not be honored. See id. ¶ 106.

LEGAL STANDARD

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Fidelity Fin. Corp. v. Federal Home Loan Bank of

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San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987), cert. denied, 484 U.S. 944 (1987).

Dismissal of a complaint can be based on either the lack of a cognizable legal theory or the lack of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e). These rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." Conley, 355 U.S. at 47. However, "conclusory allegations without more are insufficient to defeat a motion to dismiss." McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988);

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Smilecare Dental Group v. Delta Dental Plan, 88 F.3d 780, 785 n.6 (9th Cir. 1996); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 735-36 (9th Cir. 1987).

Pleadings submitted by pro se litigants are held to a less rigid standard than those drafted by attorneys. Haines v. Kerner, 404 U.S. 519, 520 (1972). Even pro se pleadings, however, "must meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong." Brazil v. United States Dep't of Navy, 66 F.3d 193, 199 (9th Cir. 1995).

DISCUSSION

I. Exhausted Claims

In a footnote, Defendant argues that because Plaintiff did not raise a gender claim in the complaints with the EEOC upon which this lawsuit is based, he is estopped from raising that claim.

Federal employees must exhaust administrative remedies for employment discrimination claims before filing suit in federal court. See Boyd v. United States Postal Serv., 752 F.2d 410, 412 (9th Cir. 1985) (citing Brown v. General Servs. Admin., 425 U.S. 820, 832 (1976)).

As noted in the April Order, Plaintiff filed two EEOC complaints on November 14, 1995 and on May 17, 1996 for which he received right to sue letters. Only the claims which Plaintiff has exhausted in these complaints can be considered by this Court.

In the November 14, 1995 EEOC complaint (1995 EEOC complaint), Plaintiff checked the boxes to allege discrimination based on race, color, gender and retaliation. On the complaint form, Plaintiff indicated that the discriminatory acts took place on July 21, 1995,

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July 26, 1995, August 28, 1995, September 12, 1995 and September 14, 1995. Plaintiff alleged that the following actions constituted discriminatory conduct: (1) Supervisor Spencer wrongly marked Plaintiff's absences from work as AWOL; (2) Postmaster August influenced Dr. El-Gohary's medical opinion by disseminating derogatory information concerning Plaintiff's medical history[2]; (3) Postmaster August ordered Plaintiff to continue to case mail when Plaintiff attempted to convey to him the medical problem he was experiencing; (4) Postmaster August and Supervisor Spencer told Plaintiff that his doctor said he was fit for duty, even when Plaintiff attempted to tell them he was having difficulty casing mail; and (5) Supervisor Spencer provided Plaintiff with incorrect information regarding the procedure for obtaining alternate medical assistance.[3] As the basis of his retaliation claim, Plaintiff stated that on June 22, 1995, his 1992 complaint was remanded back to the USPS and that the "unfounded treatment that I am now enduring are [sic] aligned with that of the prior EEO activity."

In the May 17, 1996 EEOC complaint (1996 EEOC complaint), Plaintiff checked the boxes to allege discrimination based on race, color, age and retaliation which took place on October 12, 1995. In his request for EEOC counseling, Plaintiff indicated he was alleging discrimination on all the aforementioned bases and included discrimination based on sex. Plaintiff alleged discriminatory conduct on the part of Supervisor Pennix who told

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[2]This allegation was not investigated by the EEOC.

[3]This allegation was not investigated by the EEOC.

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Plaintiff to work at his regular duties casing mail despite Dr. Watkins' order that he work on a modified basis, and followed him into the restroom to order him to return to work.

Because Plaintiff's 1995 EEOC complaint and 1996 EEOC request for counseling alleged discrimination based on gender, Plaintiff's claim of gender discrimination, based upon the conduct alleged in those complaints, may be considered by this Court.

II. Race and Gender Discrimination Claims

Defendant argues that Plaintiff has failed to allege with particularity facts demonstrating a nexus between the challenged actions of his supervisors and discrimination on the basis of Plaintiff's race or gender. Therefore, according to Defendant, Plaintiff has failed to comply with the April Order, and has not plead a prima facie case of employment discrimination.

Plaintiff alleges in his FAC that USPS supervisors engaged in numerous discriminatory acts designed to deny him meaningful employment as enjoyed by similarly situated non-African-American employees and by similarly situated women. However, the only allegations that can be considered here are the allegations that Plaintiff asserted in his 1995 and 1996 EEOC complaints.

With respect to these allegations, Plaintiff fails to allege a nexus between his supervisors' conduct and his race or gender. Plaintiff alleges that other employees with medical conditions similar to his were not subjected to the same treatment and that Defendant assigned both female and non-African-American employees duties that were within their medical restrictions, or modified their work assignments when they could not perform their assigned

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duties. However, Plaintiff's complaint does not contain any factual basis for these allegations. Plaintiff does not identify the employees, their injuries, or any specific instance of Defendant's differential treatment. Plaintiff merely asserts that Defendant treated other employees differently.

Although Plaintiff is correct that he is only required to set forth a short and plain statement that adequately gives Defendant fair notice of what his claim is and the grounds on which it rests, conclusory allegations are not sufficient to withstand a motion to dismiss. Because, despite the Court's instruction in the April Order, Plaintiff has failed to allege with particularity in his amended complaint a factual connection between the actions of his supervisors and his race or gender, the Court grants Defendant's motion to dismiss Plaintiff's race and gender discrimination claims with prejudice.

III. Retaliation Claim

Defendant argues that Plaintiff's retaliation claim must be dismissed because he has not plead a prima facie case.

To establish a prima facie case of retaliation, the plaintiff must show that: "(1) he has engaged in statutorily protected expression; (2) he has suffered an adverse employment action; and (3) there is a causal link between the protected expression and the adverse action." EEOC v. Crown Zellerbach, 720 F.2d 1008, 1012 (9th Cir. 1983) (footnote omitted). Causation may be inferred from circumstantial evidence, such as an employer's knowledge that a plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory

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employment decision. See Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987). Contact with an EEOC counselor in itself is protected activity. See Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997).

Plaintiff asserts, and Defendant does not dispute, that Plaintiff's filing of the 1992 and 1993 EEOC complaints constitutes protected activity.

In his FAC, Plaintiff alleges numerous retaliatory acts. However, as stated above, the only allegations that can be considered are those that Plaintiff also made in his 1995 and 1996 EEOC complaints, which are: (1) sometime before July 21, 1995, Postmaster August gave Dr. El-Gohary information that influenced him to place Plaintiff back on full duty; (2) on July 21, 1995, Supervisor Spencer ordered Plaintiff to do his regular work duties, refused to reassign him to duties that would accommodate his medical condition, and stated that Plaintiff would have to go home if he could not do his regular duties; (3) on July 21, 1995, Supervisor Spencer failed to advise Plaintiff how to change physicians; (4) on August 26, 1995, Supervisor Spencer wrongly charged Plaintiff with being AWOL when Plaintiff had been following Supervisor Spencer's orders to go home; (5) on August 28, 1995, Postmaster August refused to listen to Plaintiff when Plaintiff tried to explain to him his medical condition, ordered Plaintiff to continue to case mail and stood by staring at Plaintiff while Plaintiff worked; (6) on or about September 12, 1995, Postmaster August refused to reassign Plaintiff to duties that would accommodate his medical condition; and (7) on October 12, 1995,

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Supervisor Pennix told Plaintiff that his doctor's restrictions were not going to be honored.[4]

Defendant argues that Plaintiff fails to allege a causal connection between these alleged adverse employment actions and his prior protected activity.

Citing Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985), Plaintiff argues that he has alleged a causal connection between the adverse employment actions and his protected prior activity because the adverse actions occurred after June 22, 1995, the day the OFO remanded Plaintiff's 1992 complaint back to the USPS for investigation, and because prior to the remand of his complaint, on May 25, 1995, Supervisor Spencer had given him a good work evaluation.

In Mitchell, the court found there was a causal connection between the plaintiff's protected activity and the negative performance evaluations that his supervisor gave him immediately after the plaintiff undertook the protected activity. See id. at 86-87. The court based its ruling on the facts that the plaintiff testified that his supervisor was aware that he had filed a grievance and an EEO claim and that this testimony was corroborated by exhibits in the record which showed that his supervisor was contacted when the plaintiff first initiated the grievance proceedings that led to the EEO complaint. See id. at 67.

Unlike the plaintiff in Mitchell, Plaintiff does not

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[4]In his May, 1996 EEOC complaint, Plaintiff alleged that Supervisor Pennix followed him into the bathroom to tell him to return to work. Plaintiff does not reassert this allegation in his FAC.

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specifically allege that the individuals who committed the adverse actions against him had knowledge of the recent developments in his EEO activity such that a causal link could be inferred. Although Plaintiff alleges that the OFO remand letter was dated June 22, 1995, he does not allege to whom the OFO remand letter was addressed nor does he attach it as an exhibit to the FAC. The only exhibit Plaintiff attaches relating to his protected activity is the July 24, 1995 USPS Remand Acceptance Letter addressed to Plaintiff and written by William W. Norris, Acting Appeals Review Examiner/Analyst, located in San Bruno, California. Because this letter was written by a person located in the USPS San Bruno office, it does not support an inference that the OFO letter was addressed to someone in the Alameda office where Plaintiff worked. Therefore, the OFO remand letter fails to provide the causal link between Plaintiff's EEO activity and the adverse employment action.

Plaintiff's conclusory allegations, such as "a communication network exist [sic] whereby postal officials monitor and maintain information concerning employees and especially those employees who file EEO complaints for retaliatory purposes," and "the EEO Investigator is recognized by name or face by all Postmasters and supervisory personnel," are insufficient to establish that the specific individuals who committed the adverse acts knew of the recent developments with respect to Plaintiff's protected activity. Likewise, his allegation that "the supervisor who is in charge of the complaining party is alerted of the nature of the EEO investigators visit as well as to other supervisory [sic] who recognize the EEO staff personnel and procedure" is also

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insufficient to establish a causal link between his protected activity and the adverse actions because Plaintiff does not allege that any such visit took place proximate in time to the alleged retaliation. In their affidavits submitted in response to the investigation of Plaintiff's 1995 and 1996 EEO complaints, Supervisor Spencer, Postmaster August and Supervisor Pennix stated that they were aware that Plaintiff had filed prior EEO complaints. However, they stated that they did not recall when they became aware of this fact. They may have been aware of Plaintiff's EEO activity when he filed his claims in 1992 and 1993, several years before the adverse employment actions took place. Their admissions of general awareness of Plaintiff's past EEO activity does not establish the proximity in time to the retaliatory actions complained of that is necessary to raise an inference of a causal connection.

Because Plaintiff has failed to allege in his FAC a causal link between his protected activity and any adverse employment action, the Court grants Defendant's motion to dismiss Plaintiff's retaliation claim. In the April Order, the Court explained that "an act of retaliation must take place after the alleged retaliator learns of the protected activity being retaliated against." April Order at 18:19-21. Because Plaintiff has failed to allege that the alleged retaliators learned of his protected activity proximately before they took the retaliatory action, Plaintiff's retaliation claim is dismissed with prejudice. Because all of Plaintiff's claims are dismissed, Plaintiff's Rule 56(f) request to continue the motion for summary judgment for further discovery is denied as

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moot.

CONCLUSION

For the reasons stated above, the Court GRANTS Defendant's motion to dismiss (Docket No. 22), and DENIES Plaintiff's Rule 56(f) request for discovery.

Dated: MAR 27 2001

CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

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For the Northern District of California

EDITOR'S NOTE

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ORIGINAL

No. 01-10374

Supreme Court, U.S.
FILED
SEP 23 2002
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD J. RUCKER, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

MARLEIGH D. DOVER
CONSTANCE A. WYNN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioner's complaint because it failed to allege specific facts establishing a prima facie case of discrimination on the basis of race, color, and gender, or of unlawful retaliation under Title VII, 42 U.S.C. 2000e et seq.

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-10374

HAROLD J. RUCKER, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published.

JURISDICTION

The court of appeals entered its judgment on February 21, 2002. The petition for a writ of certiorari was filed on May 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an African-American male, worked at the post office in Alameda, California, from May 14, 1991, until March 18, 1996, when he was discharged. Pet. App. B3; Pet. 4. Petitioner has filed a series of lawsuits against the Postal Service alleging a variety of forms of employment discrimination.

The first suit, which was filed in December 1994, alleged racial discrimination by the Postal Service in disqualifying petitioner from a promotion. That case ended with a jury verdict in favor of the Postal Service. 4/26/00 Dist. Ct. Dec. 2.[1]

In September 1996, petitioner filed suit alleging discrimination on the basis of race, gender, age, and disability, as well as retaliation for the filing of a complaint with the Equal Employment Opportunity Commission. The district court entered summary judgment for the Postal Service. 4/26/00 Dist. Ct. Dec. 4.

In May 1997, petitioner filed suit alleging discrimination on the basis of disability, violation of his constitutional rights to due process and equal protection, and unlawful retaliation. The district court entered summary judgment in favor of the Postal Service. 4/26/00 Dist. Ct. Dec. 5.

In June 1999, petitioner filed two complaints again alleging discrimination on the basis of gender, race, age, and disability,

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[1] A copy of the district court's April 26, 2000, decision is attached to this brief as Appendix A.

as well as unlawful retaliation. The district court ruled that the age discrimination and disability claims were barred on res judicata grounds. 4/26/00 Dist. Ct. Dec. 12-17. The court dismissed as "frivolous" petitioner's gender and race discrimination claims. Id. at 12. The court acknowledged that petitioner's complaints "describe in great detail his interactions with various supervisors relating to his attempt to obtain accommodations for his claimed disability, and reassignment." Ibid. The complaints, however, contained no allegations "suggest[ing] a nexus between his supervisors' responses to his disability complaints and his gender or race." The court concluded that petitioner's "bare legal conclusions with no suggestion of supporting facts" were insufficient, and dismissed the complaints without prejudice. Ibid.

The court admonished petitioner that, were he to attempt to revive his claims, "his amended claims must allege with particularity a factual connection between the actions of his supervisors and his gender or race, if he truthfully can make such allegations." Ibid. The failure to allege the "necessary factual basis to support a claim of employment discrimination based on gender or race," the court cautioned, would result in a dismissal with prejudice. Ibid. The court also dismissed petitioner's retaliation claim, "[b]ecause it is difficult to discern which of the actions [petitioner] complains of were allegedly retaliatory

for which of his prior activities," but granted petitioner leave to filed an amended complaint. Id. at 18. The court explained that, to survive dismissal, the amended complaint must allege that the "act of retaliation * * * [took] place after the alleged retaliator learn[ed] of the protected activity being retaliated against." Ibid.

Finally, the district court ruled that petitioner "is a vexatious litigant." 4/26/00 Dist. Ct. Dec. 20. The court explained that, in addition to the fact that petitioner "has filed and lost five federal lawsuits against the [Postal Service] related to his employment at the Alameda post office," petitioner has also filed "two federal tort cases against the [Postal Service] * * * which were both dismissed." Ibid.; see also id. at 19 n.3. The district court accordingly enjoined petitioner from filing any further actions in federal court against the Postal Service without leave of court. Id. at 20. To obtain leave of the court, petitioner must certify that any proposed claims "are new claims never before raised and disposed of on the merits by any federal court." Id. at 20-21.

2. This case arises from the amended complaint petitioner filed in response to the district court's April 2000 order.[2] That complaint details at great length petitioner's alleged medical and

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[2] A copy of that complaint is attached to this brief as Appendix B.

psychiatric conditions and their effect on his employment performance. Briefly, beginning in November 1994, petitioner complained to postal officials that sorting mail caused him neck and shoulder pain. Pet. App. B5. Postal officials responded by reassigning petitioner to light mail duties where he could sit on a stool and take frequent breaks. Ibid.; First Amended Complt. 3-4. Petitioner later complained that the inhalation of dust while sorting mail caused him to suffer sinus problems. The Postal Service responded by reassigning him to other tasks. Pet. App. B5.; 4/26/00 Dist. Ct. Dec. 3. On July 21, 1995, petitioner was cleared by his treating physician to return to his regular postal duties. Pet. App. B5. Shortly thereafter, petitioner informed his supervisor that he was unable to continue sorting mail due to neck and shoulder pain. When petitioner failed either to appear for work or to provide medical documentation of his restrictions, his supervisor charged him with being absent without taking official leave. Id. at 6. Upon petitioner's return to work, postal officials offered him a modified mail carrier position. 4/26/00 Dist. Ct. Dec. 3. Petitioner refused the assignment on the ground that the dust mask he would need to wear was inadequate and that he would have to engage in repetitive movements. Ibid. At the request of postal officials, petitioner underwent a psychiatric examination in which he was diagnosed as suffering from "paranoid personality disorder," with "a potential for violent behavior."

Id. at 3-4. On March 18, 1996, petitioner was discharged and placed on disability retirement. Id. at 4.

After detailing his long-running dispute with the Postal Service over his medical conditions, the complaint asserts that other postal employees "with medical conditions similar to his were not subjected to the same treatment" and that the Postal Service "assigned both female and non-African-American employees duties that were within their medical restrictions, or modified their work assignments when they could not perform their assigned duties." Pet. App. B11-B12. See also First Amended Complt. ¶¶ 68, 74, 83, 117, 125-133, 146, 150-151. With respect to his retaliation claim, the complaint alleges that he was denied a promotion because he filed an employment discrimination claim in 1992. The complaint also asserts that his reassignment in February 1995 to sort bulk mail was an additional retaliatory act because postal officials knew that dust caused him sinus problems. See id. ¶¶ 172, 177.[3]

3. The district court granted the Postal Service's motion to dismiss petitioner's amended complaint. Pet. App. B. With respect to petitioner's allegations of race, color, and gender discrimination, the court ruled that, "despite the Court's instruction in the April Order," petitioner's complaint

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[3] The amended complaint also reasserted his age discrimination claim, even though the district court had dismissed that claim on res judicata grounds in its April 2000 order. See 4/26/00 Dist. Ct. Dec. 15.

> does not contain any factual basis for these allegations. [Petitioner] does not identify the employees, their injuries, or any specific instance of [the Postal Service's] differential treatment. [Petitioner] merely asserts that [the Postal Service] treated other employees differently.

Id. at B12. The district court also dismissed the retaliation claim, on the ground that the amended complaint failed to allege, as required by the April 2000 order, id. at B16, "that the individuals who committed the adverse actions against [petitioner] had knowledge of" petitioner's protected "EEO activity such that a causal link could be inferred." Id. at B15.

4. The court of appeals affirmed in a brief, per curiam, unpublished decision. Pet. App. A. The court held that "[t]he district court properly dismissed [petitioner's] amended complaint because it failed to state a prima facie claim for discrimination due to race or gender, * * *, or for retaliation." Id. at A2 (citations omitted).

DISCUSSION

1. Last Term, in Swierkiewicz v. Sorema N.A., 122 S. Ct. 992 (2002), this Court unanimously held that courts may not dismiss an employment discrimination complaint on the ground that it fails to allege "specific facts establishing a prima facie case of discrimination." Id. at 995. Such complaints, instead, need only contain "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Ibid. (quoting Fed. R. Civ. P. 8(a)(2)).

The court of appeals' holding that the district court properly dismissed petitioner's complaint because it "failed to state a prima facie claim for discrimination due to race or gender, * * *, or for retaliation," Pet. App. A2, appears to be inconsistent with this Court's holding in Swierkiewicz. Accordingly, it would not be inappropriate for the Court to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for reconsideration in light of Swierkiewicz v. Sorema N.A., supra.

2. Such an exercise of this Court's discretionary certiorari jurisdiction is not compelled by the record of this case, however. This Court ordinarily does not exercise its certiorari jurisdiction merely to correct errors in lower court opinions, "[e]ven if there [a]re no grounds for affirmance." Boag v. MacDougal, 454 U.S. 364, 367-368 (1982) (Rehnquist, J., dissenting) ("Even if there were no grounds for affirmance, I would find this case unworthy of the Court's attention. In our zeal to provide 'equal justice under law,' we must never forget that this Court is not a forum for the correction of errors. As was said by Chief Justice Vinson: 'The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions.'"); see also Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966, 971 (1982) (Stevens, J., dissenting) ("As Justice REHNQUIST has reminded us, in 'our zeal to provide "equal justice under law," we

must never forget that this Court is not a forum for the correction of errors.'").

Such restraint would be particularly appropriate in this case, in light of petitioner's long history of repetitious and, as the district court found (4/26/00 Dist. Ct. Dec. 20), vexatious litigation against the Postal Service. This case represents the eighth case petitioner has pursued -- five prior employment discrimination cases and two tort cases have resulted in judgments adverse to petitioner. Not one court has found any merit to any of petitioner's claims.

The procedural posture of this case, moreover, does not fit squarely within the Swierkiewicz mold. In Swierkiewicz, which petitioner does not even cite, the complaint was dismissed ab initio. This Court emphasized that the Federal Rules provide an alternative mechanism for addressing vague or ambiguous complaints, by allowing district courts to order clarification if the pleading fails to provide "sufficient notice" to permit a defendant to respond meaningfully to the allegations. 122 S. Ct. at 998 (citing Rule 12(e)'s provision for a more definite statement). If a party fails to comply with an order for a more definite statement, the district court "may strike the pleading * * * or make such order as it deems just." Fed. R. Civ. P. 12(e).

The district court's April 2000 order dismissing petitioner's fourth and fifth cases against the Postal Service, without

prejudice, can be considered the functional equivalent of an order for a more definite statement under Federal Rule of Civil Procedure 12(e). That is because the district court's April order expressly advised petitioner what type of information the amended complaint would need to contain to clarify his allegations and to articulate a claim to which the Postal Service could reasonably be expected to respond. Furthermore, in ultimately dismissing the complaint with prejudice, in the order under review here, the district court explained that the dismissal was a consequence of petitioner's failure to adhere to "the Court's instruction in the April Order," Pet. App. B12; see also id. at B16.

Such clarification of the complaint was necessary, moreover, quite apart from any mistaken focus on the need to plead a prima facie case. Although petitioner has sued an employer as large as the United States Postal Service for allegedly engaging in disparate treatment of employees, he has failed to provide any information at all to identify in any way those employees, past or present, who he alleges received some unexplained form of differential treatment at some unknown time before or after the incidents at issue in this case. Likewise, the district court's dismissal of petitioner's retaliation claim was predicated on his failure to allege any factually discernible nexus between the alleged retaliatory acts and his protected activities. Pet. App. B16. Thus, unlike the complaint in Swierkiewicz, which "included

the ages and nationalities of at least some of the relevant persons involved with his termination," 122 S. Ct. at 999, the district court's dismissal in this case occurred after the petitioner failed to cooperate with the district court's effort to bring some measure of coherence to his factually untethered allegations of discrimination in the air. Neither Swierkiewicz nor this Court's general certiorari practice compels that petitioner be given a third bite at the apple in this his eighth meritless lawsuit against the Postal Service.

We accordingly suggest that, notwithstanding the apparent legal error in the court of appeals' analysis, denial of the petition is appropriate in view of this case's unusual procedural history.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be granted, the judgment should be vacated, and the case should be remanded to the court of appeals for reconsideration in light of Swierkiewicz v. Sorema N.A., 122 S. Ct. 992 (2002).

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

MARLEIGH D. DOVER
CONSTANCE A. WYNN
Attorneys

SEPTEMBER 2002

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED

APR 26 2000

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

HAROLD J. RUCKER,

Plaintiff,

v.

WILLIAM J. HENDERSON, United States Postmaster General,

Defendant.

/

Nos. C 99-3082 CW
C 99-3107 CW

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, TO RESTRICT FURTHER FILINGS BY PLAINTIFF, AND TO STAY DISCOVERY

United States District Court
For the Northern District of California

Defendant William J. Henderson, United States Postmaster General, moves to dismiss Plaintiff Harold J. Rucker's complaints on grounds of res judicata and collateral estoppel, to stay discovery in the event that the complaints are not dismissed, and to restrict Plaintiff from filing further claims against Defendant, the United States Postal Service (USPS), or any USPS employee, absent leave of court. Plaintiff, proceeding pro se, opposes the motions. Having considered all of the papers filed by the parties, the Court GRANTS Defendant's motions to dismiss and to restrict Plaintiff from further filings against Defendant, the USPS, or any USPS employee without leave of court. The Court further GRANTS Defendant's motion to stay discovery.

BACKGROUND

Plaintiff worked as a postal clerk for the USPS in Alameda from May 14, 1991 until March 18, 1996. His duties included sorting mail and collecting mail from street mailboxes. On

December 15, 1994, Plaintiff filed a discrimination claim against the USPS under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., alleging that he had been disqualified from eligibility for promotion to the position of electronic technician on the basis of race (Case Number One). The case was tried to a jury before this Court. The jury rendered a verdict in favor of the USPS.

In late 1994, Plaintiff filed a workers' compensation claim due to an occupational injury to his neck and back that occurred on November 30, 1994. Because of his injury, Plaintiff was reassigned to light duty activities that included sorting undeliverable bulk business mail, but did not involve driving. A younger employee was allegedly assigned to Plaintiff's former position. In April, 1995, Plaintiff requested that he be returned to those of his prior letter-carrier duties, such as driving, that did not involve repetitive movements. Apparently, his request was denied because the letter carrier position required performance of all functions, and not just those that Plaintiff's doctors said he could perform.

On May 15, 1995, Plaintiff filed a second workers' compensation claim for a sinus infection brought on by dust allergens in the undeliverable bulk business mail he was required to sort. Plaintiff was apparently accommodated by reassignment to other tasks. On July 21, 1995, Plaintiff was informed that his treating physician found him fit to return to his full mail sorting duties, to which he was immediately reassigned.

On September 18, 1995, Plaintiff filed a third workers' compensation claim for recurrence of the pain and muscular tension

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that had first manifested itself on November 30, 1994. With his claim, he submitted two medical reports by doctors who recommended that his job be modified to accommodate both his injury and his dust allergy. On October 17, 1995, the psychologist who had examined Plaintiff in connection with his third workers' compensation claim reported that Plaintiff had exhibited a need for, and had been offered, psychiatric treatment, but had repeatedly declined such treatment.

On November 3, 1995, Plaintiff was offered a modified mail carrier position to accommodate his physical limitations. The new position required Plaintiff to process bulk mail, collect mail, case mail, and perform other unspecified tasks, each for limited periods of time each day. He rejected this accommodation, asserting that the position subjected him to excessive levels of dust and that the dust masks provided by his employer were inadequate. He also asserted that the job was unsuitable because it required him to perform repetitive movements.

On November 21, 1995, the postmaster of the Alameda Post Office requested that Plaintiff submit to a psychiatric examination to determine his fitness for duty. Three days later, on November 24, 1995, Plaintiff filed another workers' compensation claim and asked to be put on administrative leave for two months. On December 8, 1995, Plaintiff underwent the psychiatric evaluation requested by the postmaster. The examining psychiatrist found that Plaintiff was incapable of performing the functions of his position and had a potential for violent behavior. These findings were confirmed in a subsequent evaluation by the assistant medical

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director of the Postal Service's Oakland District, who concluded, on January 24, 1996, that Plaintiff was unfit for duty due to a paranoid personality disorder. On February 12, 1996, the USPS informed Plaintiff in writing that it intended to terminate his employment because his psychiatric examinations revealed that he was unable to perform his duties. Plaintiff was discharged, effective March 18, 1996, and given disability retirement.

On September 27, 1996, Plaintiff instituted an action against the USPS under Title VII and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., (Case Number Two), alleging that he had been harassed by his immediate supervisor based on his race, gender, and age; refused the promotion to electronic technician (which was the subject of Case Number One) in retaliation for filing an Equal Employment Opportunity Commission (EEOC) complaint against his supervisor for race, gender, and age discrimination; and terminated because he was disabled. The latter two claims were dismissed because the retaliation claim had been litigated in Case Number One, the termination claim was the subject of pending litigation in Case Number Three (see below), and because Plaintiff had failed to exhaust his administrative remedies with respect to these claims prior to filing suit. The Court granted the USPS' motion for summary judgment on the harassment claim because Plaintiff had failed to establish a prima facie case of harassment based on gender, race, or age, and because the alleged harassment was neither sufficiently severe nor pervasive to give rise to a Title VII claim. Further, the Court warned that Plaintiff's repeated prosecution of non-meritorious claims was

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abusive and that, if he did not desist from filing such claims, the Court would declare him a vexatious litigant.

On May 21, 1997, Plaintiff again filed suit against the USPS for (1) disability discrimination under §§ 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794; (2) violations of his equal protection and due process rights; and (3) retaliation (Case Number Three). Plaintiff alleged that his assignment to sort undeliverable bulk mail exacerbated his repetitive motion injury and his allergies, that he was refused the accommodation of reassignment to his previous collection duties, and that he was offered promotion to a job that the USPS knew he would reject because it involved unacceptable working conditions.

On April 28, 1998, this Court granted summary judgment in favor of the USPS on Plaintiff's Rehabilitation Act claim on the ground that, in light of Plaintiff's paranoid personality disorder and potential for violence, there was no material factual dispute as to whether Plaintiff was an otherwise qualified individual with a disability. The Court also dismissed Plaintiff's constitutional claims on the ground that the Rehabilitation Act provides the exclusive remedy for disability discrimination in employment by the Postal Service.

On September 8, 1998, the Court granted summary judgment in favor of the USPS with respect to Plaintiff's retaliation claim, stating that because Plaintiff had failed to present a triable issue of fact as to whether he was a qualified individual with a disability, he could not state a claim for retaliation under the Rehabilitation Act. The Court further held that Plaintiff could

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not make out a case of retaliation under Title VII because he had failed to present any evidence of reasonable promotions or reassignments that were denied him, to adduce evidence that the job offer made to him was an adverse employment action, or to present any evidence of a causal link between his equal opportunity complaint and any adverse action taken against him. Finally, the Court held that, even if Plaintiff had alleged that he was fired in retaliation for filing his EEOC complaint, the USPS would be entitled to summary judgment based on the Court's previous finding that the USPS had a legitimate, non-discriminatory reason for terminating him.

On June 26, 1999, Plaintiff filed the first of the two pending complaints against Defendant, alleging gender discrimination, race discrimination, age discrimination, and retaliation, pursuant to Title VII, the Rehabilitation Act, and the ADEA (Case Number Four). The complaint alleges that Plaintiff was refused accommodation of his disability and subjected to a hostile work environment because of his gender and race; refused reassignment to his regular mail carrier duties, including driving, because of his age; and harassed in retaliation for filing EEOC complaints against his supervisors.

Plaintiff filed the second of his pending complaints on June 28, 1999, alleging that Defendant had subjected him to gender discrimination, race discrimination, age discrimination, disability discrimination, and retaliation, under Title VII, the Rehabilitation Act, and the ADEA (Case Number Five). Specifically, Plaintiff alleges that he was deprived of employment opportunities because of his gender and race; refused reassignment to regular

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mail carrier duties, including driving, because of his age; denied reasonable accommodations of his disability; and subjected to retaliation for filing employment discrimination complaints with the EEOC.

DISCUSSION

I. Legal Standard

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts that would entitle him or her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Fidelity Fin. Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. See Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

Dismissal of a complaint can be based on either the lack of a cognizable legal theory or the lack of sufficient facts alleged under a cognizable legal theory. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

II. Res Judicata and Collateral Estoppel

In the cases currently before this Court, Plaintiff states the following causes of action:.(1) gender discrimination, (2) race

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discrimination, (3) age discrimination, (4) failure to accommodate his disability, and (5) retaliation. Defendant contends that these claims are barred by res judicata. To the extent that Plaintiff's claims are not barred by res judicata, Defendant argues that they are barred under the doctrine of collateral estoppel.

Res judicata, or claim preclusion, prohibits the re-litigation of any claims that were raised or could have been raised in a prior action. See Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997) (citing Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981)). The purpose of the doctrine is to "relieve parties of the cost and vexation of multiple law suits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Marin v. HEW, Health Care Financing, 769 F.2d 590, 594 (9th Cir. 1985) (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)). Res judicata operates only where there is "1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties." Western Radio, 123 F.3d at 1192 (citing Blonder-Tongue Lab. v. University of Ill. Found., 402 U.S. 313, 323-324 (1971)).

Two claims or causes of action are the same, for purposes of the first prong of the res judicata test, if they arise from the same transaction or series of transactions. Two events are part of the same transaction or series of transactions where the claims share a factual foundation such that they could have been tried together. See Western Systems, Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992). "Different theories supporting the same claim for relief must be brought in the initial action." Id. Likewise, all

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evidence pertinent to a particular claim must be raised in the initial action because "when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948) (internal quotation marks omitted).

Collateral estoppel, or issue preclusion, bars the re-litigation of issues adjudicated in a previous lawsuit between the same parties. Kamilche Co. v. United States, 53 F.3d 1059, 1062 (9th Cir. 1995), amended by 75 F.3d 1391 (1996). Collateral estoppel applies only if an issue of fact was "actually and necessarily determined" in the prior case. See Montana v. United States, 440 U.S. 147, 153 (1979). The party asserting estoppel has the burden of pleading and proving the identity of issues in the prior and current cases. See Hernandez v. City of Los Angeles, 624 F.2d 935, 937 (9th Cir. 1980). To sustain that burden, the party "must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." Id.

A. Gender and Race Discrimination

Plaintiff conclusorily asserts in both of his pending complaints that Defendant "acted to create and maintain a hostile work environment for the plaintiff because of his gender." Case Number Four Complaint ¶ 32; Case Number Five Complaint ¶ 97. He also alleges that he was "limited . . . in his job classification,

job assignments, wages and other benefits because of [his] race and further contributed in his discharge from employment [sic]." Case Number Four Complaint ¶ 55; Case Number Five Complaint ¶ 116. Plaintiff further speculates that his supervisors felt they could subject him to unfair treatment without fear of reprisal because they, like Plaintiff, are black. These are the only allegations Plaintiff makes in connection with his gender and race discrimination claims.

Defendant argues that Plaintiff's gender and race discrimination claims are barred by res judicata because they were brought or could have been brought in his prior suits. Defendant is incorrect.

In Cases Number One and Two, Plaintiff alleged that his immediate supervisor subjected him to gender- and race-based harassment and discrimination between March and August, 1992. Plaintiff's current gender and race discrimination claims arise from different incidents of alleged harassment allegedly perpetrated by different post office personnel between November 30, 1994 and March 18, 1996. Thus, Plaintiff's pending claims have not been litigated in any prior suit.

Nor could Plaintiff have raised his current claims in a prior action. Plaintiff's pending gender and race discrimination claims were the bases for two EEOC complaints lodged by Plaintiff on November 14, 1995 and May 17, 1996. Plaintiff's right-to-sue letter from the EEOC regarding his 1995 complaint was issued on March 29, 1999. See Case Number Five Complaint, Ex. P. His right-to-sue letter regarding his 1996 complaint was issued on March 26,

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1999. See Case Number Four Complaint, Ex. C. Thus, Plaintiff had not exhausted his administrative remedies with respect to his 1995 and 1996 complaints when he brought his previous suits and, consequently, he could not have raised his gender and race discrimination claims at that time. See 42 U.S.C. 2000e-5(f) (an employee must file charges of discrimination with the EEOC and receive a right-to-sue letter before bringing a private action based on gender or race discrimination against his employer in federal court); Vinieratos v. Dep't of the Air Force, 939 F.2d 762, 768 (9th Cir. 1991) (Title VII requires employees to exhaust their administrative remedies before filing a lawsuit). The Court accordingly concludes that Plaintiff's gender and race discrimination claims are not barred by res judicata.

Nevertheless, Plaintiff's gender and race discrimination claims must be dismissed, with leave to amend. Plaintiff was granted leave to file the instant actions in forma pauperis (IFP). See 28 U.S.C. § 1915(a). When a plaintiff proceeds IFP, the Court has a duty to dismiss a frivolous claim. See 28 U.S.C. § 1915(e)(2)(B).[1] An IFP claim is frivolous if it has "no arguable

[1]Section 1915(e)(2)(B) states:

> [T]he court shall dismiss the case at any time if the court determines that--
>
> (B) the action or appeal--
> (i) is frivolous or malicious;
> (ii) fails to state a claim on which relief may be granted; or
> (iii) seeks monetary relief against a defendant who is immune from such relief.

Prior to amendment in 1996, § 1915(e)(2)(B) was numbered § 1915(d).

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basis in fact or law." O'Loughlin v. Doe, 920 F.2d 614, 617 (9th Cir. 1990) (quoting Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984)).

Plaintiff's gender- and race-based harrassment claims describe in great detail his interactions with various supervisors relating to his attempt to obtain accommodations for his claimed disability, and reassignment. He makes no allegations, however, that suggest a nexus between his supervisors' responses to his disability complaints and his gender or race. Plaintiff's assertions of "bare legal conclusions with no suggestion of supporting facts" are insufficient to raise an inference that the behavior of his supervisors was motivated by gender- or race-based animus. See Franklin, 745 F.2d at 1228. The Court, therefore, dismisses Plaintiff's gender and race discrimination claims as frivolous. However, the Court grants Plaintiff leave to amend his gender and race discrimination claims. Plaintiff is advised that his amended claims must allege with particularity a factual connection between the actions of his supervisors and his gender or race, if he truthfully can make such allegations. Plaintiff's amended claims will be subject to dismissal with prejudice if he fails to allege the necessary factual basis to support a claim of employment discrimination based on gender or race.

B. Age Discrimination

Unlike Title VII gender and race discrimination claims, exhaustion of administrative remedies is not a prerequisite to an age discrimination claim. The filing provisions of the ADEA do not require an individual to receive a right-to-sue letter before

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filing a federal lawsuit. See 29 U.S.C. § 626(c), (d). The only statutory restriction on filing a civil action under the ADEA is that, if an age discrimination charge is lodged with the EEOC, a complainant must wait sixty days from the date it was lodged to file a lawsuit. See 29 U.S.C. § 626(e).

Plaintiff filed his age discrimination claim with the EEOC on May 17, 1996. Therefore, he could have brought a lawsuit against the USPS for age discrimination any time after July 16, 1996. Plaintiff filed his complaint in Case Number Three approximately ten months later, on May 21, 1997. Thus, if there was an identity between the claims raised in Case Number Three and Plaintiff's pending age discrimination claims, a final judgment on the merits of the claims raised in Case Number Three, and privity between the parties in Case Number Three and the instant cases, res judicata will bar Plaintiff's age discrimination claims. In Case Number Three, Plaintiff brought an employment discrimination claim against the USPS under the Rehabilitation Act for, inter alia, its repeated refusal to reassign him to his original mail carrier position, which Plaintiff alleged would have reasonably accommodated his disability. Plaintiff alleged that the USPS' refusal to reassign him to the mail carrier position constituted disability discrimination, and was further motivated by a desire to retaliate against him for filing an EEOC complaint for race discrimination against his supervisor. See Case Number Three Complaint ¶¶ 7-20. In the current cases, Plaintiff attributes the failure of the USPS to reinstate him to his original mail carrier position to age discrimination. He states that his mail carrier duties were

assigned to "a younger female employee who had less seniority, less experience, was paid lower wages than that of the Plaintiff." Case Number Four Complaint ¶ 48; Case Number Five Complaint ¶ 108.

As stated above, the identity of claims requirement of res judicata is satisfied where the claims are based on the same facts and could have been tried together. See Western Systems, 958 F.2d at 871. Plaintiff's disability discrimination and retaliation claims in Case Number Three were premised on the same series of events, occurring over the same time period of November 30, 1994 to March 18, 1996, as Plaintiff's pending age discrimination claims. In essence, what Plaintiff now claims constituted age discrimination, namely, the failure to reassign him to his original mail carrier position, Plaintiff previously claimed constituted disability discrimination and retaliation. These alternate theories of liability could and should both have been raised in Case Number Three. See id. Thus, the Court concludes that the identity of claims requirement is met.

Plaintiff's disability discrimination and retaliation claims in Case Number Three were dismissed on summary judgment because the Court found that Plaintiff had failed to raise a material factual dispute as to whether he was an otherwise qualified individual with a disability entitled to protection under the Rehabilitation Act. See April 28 Order at 12-13; September 8 Order at 8. Thus, the second prong of the res judicata test is met. See Jackson v. S.I. Hayakawa, 605 F.2d 1121, 1125 n.3 (9th Cir. 1979) (a disposition by summary judgment is a judgment on the merits for purposes of res judicata).

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Finally, the third prong of the res judicata test is satisfied because Defendant is in privity with the defendant in Case Number Three, the USPS. "Privity represents a legal conclusion that the relation between the party and non-party is so close that the judgment may fairly bind the non-party." Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1277-78 (9th Cir. 1992) (internal quotation marks omitted). The proper defendant in a suit brought by a USPS employee under Title VII or the Rehabilitation Act is the current Postmaster General. See Johnston v. Horne, 875 F.2d 1415, 1418-1419 (9th Cir. 1989); 42 U.S.C. § 2000e-16(c).[2] Thus, the Postmaster General serves as a representative of the USPS in litigation. Therefore, the Court concludes that the parties are in privity for purposes of res judicata.

Because all three requirements of the res judicata test are met with respect to Plaintiff's age discrimination claims, the Court grants Defendant's motion to dismiss those claims.

C. Failure to Accommodate

In Case Number Five, Plaintiff alleges that Defendant failed to accommodate his mental and physical disabilities, in violation of the Rehabilitation Act, by refusing to relieve him of those tasks that aggravated his condition. Specifically, he alleges that he was required to continue to sort mail and perform tasks that involved rapid, repetitive hand and arm movement, that he was

[2] Because this Court granted the USPS' motion for summary judgment on Plaintiff's disability discrimination claim in Case Number Three, it did not address the matter of Plaintiff's failure to name the appropriate party.

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required to stand while working, and that he was not permitted to take breaks, despite Defendant's knowledge that his disability would be aggravated by these restrictions. Plaintiff made essentially the same allegations against Defendant in Case Number Three, in which Plaintiff alleged that the USPS failed to accommodate his back and allergy disabilities by forcing him to sort mail, a task that required him to perform repetitive motions and that exposed him to dust. The failure to accommodate claims in the two cases differ only in the amount of detail provided by Plaintiff, and in the omission of any reference to dust allergies in the instant complaint.

Neither Plaintiff's allegation of additional facts to substantiate his current claim, nor his omission of other facts, is sufficient to defeat the identity prong of the res judicata test. See Sunnen, 333 U.S. at 597. Therefore, Plaintiff's pending claim that Defendant failed to accommodate his disability is the same as the claim previously litigated in Case Number Three.

The second prong of the res judicata test is also satisfied here because Plaintiff's earlier disability discrimination claim was dismissed on summary judgment. See Jackson, 605 F.2d at 1125 n.3. Finally, the third element of the test is met because, as explained above, Defendant is in privity with the defendant in Case Number Three, the USPS.

Because Plaintiff's failure to accommodate claim is barred by res judicata, it must be dismissed. However, even if Plaintiff's claim were not barred by res judicata, it would have to be dismissed under the doctrine of collateral estoppel. In Case

Number Three, this Court found that there was no material factual dispute as to whether Plaintiff was an otherwise qualified individual with a disability because Plaintiff's psychological condition rendered him unfit to perform his job. See April 28 Order at 12-13. Plaintiff is, thus, collaterally estopped from re-litigating the issue of his disability status. Because Plaintiff cannot show that he is otherwise qualified to perform the essential functions of his job, he cannot assert a right to accommodation under the Rehabilitation Act. See Dempsey v. Ladd, 840 F.2d 638, 640 (9th Cir. 1987); Lucero v. Hart, 915 F.2d 1367, 1372 (9th Cir. 1990).

C. Retaliation

To establish a prima facie case of retaliation, Plaintiff must show that (1) he opposed conduct by his employer made unlawful by Title VII, or participated in an enforcement action authorized by Title VII against such conduct; (2) he was subjected to an adverse employment action; and (3) there is a causal link between his opposition or participation and the adverse treatment. See Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997); Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994).

It is not clear what opposition or enforcement activities Plaintiff contends form the basis for Defendant's alleged retaliation against him. Plaintiff incorporates by reference his allegations of gender, race, and age discrimination into his retaliation claims. See Case Number Four Complaint ¶ 61; Case Number Five Complaint ¶ 122. Plaintiff further mentions "two previous EEO complaints," describing the first as involving "a

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female supervisor referring to the plaintiff as a 'dumb ass man' and 'stupid' among other things, and creat[ing] a work environment that was unacceptable and intolerable." Case Number Four Complaint ¶ 62; Case Number Five Complaint ¶ 123. Plaintiff does not identify the second EEOC complaint. He goes on, however, to allege that he was subjected to retaliatory harrassment and discriminatory work standards because he filed "several EEO complaints against the agency." See Case Number Four Complaint ¶ 66; Case Number Five Complaint ¶ 127. Finally, Plaintiff attaches to each of his complaints a right-to-sue letter pertaining to a specific EEOC complaint. See Case Number Four, Ex. C; Case Number Five, Ex. P.

Because it is difficult to discern which of the actions Plaintiff complains of were allegedly retaliatory for which of his prior activities, the Court grants Plaintiff leave to amend these claims. Plaintiff must specifically identify the opposition or enforcement activities that form the basis for the alleged retaliation against him, and identify with particularity the timing and nature of the allegedly retaliatory acts taken against him as a result of those activities. An act of retaliation must take place after the alleged retaliator learns of the protected activity being retaliated against.

III. Pre-filing Review Order

Defendant moves the Court to impose a pre-filing review restriction on Plaintiff's future actions against Defendant, the USPS, and USPS employees. In support of his motion, Defendant cites the cases previously filed by Plaintiff in federal court in

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connection with his employment at the Alameda Post Office.[3] Defendant further notes that in Case Number Two, the Court warned Plaintiff that he risked being "declared a vexatious litigant and ordered to seek pre-filing review of all new complaints." Case Number Two, October 31, 1997 Order Granting Summary Judgment at 8. Plaintiff responds that his suits are not frivolous, and invites the Court to review his past claims in order to determine their validity.

The Ninth Circuit has stated that "frivolous claims by a litigious plaintiff may be extremely costly to defendants and can waste valuable court time." DeNardo v. Murphy, 781 F.2d 1345, 1348 (9th Cir. 1986). Thus, federal courts have the "inherent power . . . to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances." De Long v. Hennessey, 912 F.2d 1144, 1147 (9th Cir. 1990); see also 28 U.S.C. § 1651(a). Any such order, however, "must be designed to preserve [the] right to adequate, effective and meaningful access to the courts while preserving the court from abuse." O'Loughlin, 920 F.2d at 617 (quoting Franklin 745 F.2d at 1231-32). In keeping with these goals, a court contemplating issuance of a pre-filing review order must 1) give the plaintiff an opportunity to oppose it; 2) present an adequate record for review; 3) make substantive findings of frivolousness or harassment; and 4)

---

[3] In addition to the cases already discussed, Plaintiff filed a tort claim against the USPS charging that it had failed to cooperate with his applications for workers' compensation, and a tort claim against his supervisors for intentional infliction of emotional distress. Both cases were dismissed.

narrowly tailor the restrictions to fit the abuse. See Johns v. Town of Los Gatos, 834 F. Supp. 1230, 1232 (N.D. Cal. 1993) (citing De Long, 912 F.2d at 1147-48).

Plaintiff has filed and lost five federal lawsuits against the USPS related to his employment at the Alameda post office. As discussed above, in Case Number One, a jury rendered a verdict against Plaintiff. In Case Number Two, the court found that Plaintiff's claims were either procedurally barred or lacking evidentiary support sufficient to raise even an inference of discrimination. In Case Number Three, this Court found that Plaintiff's constitutional claims were improperly brought and, further, that Plaintiff had adduced insufficient evidence of retaliation or disability discrimination to avoid summary judgment. In addition to these lawsuits alleging employment discrimination, Plaintiff filed the two federal tort cases against the USPS mentioned in footnote three above, which were both dismissed. Plaintiff now brings two more employment discrimination cases against the USPS in pending Cases Number Four and Five, in which he raises claims that are frivolous or procedurally barred.

Based on this record of filing frivolous claims, the Court finds that Plaintiff is a vexatious litigant and grants Defendant's motion for a pre-filing review order. Pursuant to the separately issued pre-filing review order, Plaintiff is hereby enjoined from filing any further actions in federal court against the USPS, USPS employees, or Defendant without first obtaining leave of court. In seeking leave of court, Plaintiff must certify that the claims he wishes to present are new claims never before raised and disposed

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of on the merits by any federal court. Failure to do so will result in Plaintiff's complaint not being filed.

CONCLUSION

For the reasons stated above, the Court GRANTS Defendant's motions to dismiss (Case No. C 99-3082, Docket No. 13; Case No. C 99-3107, Docket No. 10), and GRANTS Defendant's motion to restrict Plaintiff from filing further actions against Defendant, the USPS, or USPS employees, without first obtaining leave of court. Because Plaintiff's complaints in Cases Number Four and Five are duplicative, the Court dismisses Case Number C 99-3107 and orders Plaintiff to submit any further papers in connection with this matter under Case Number C 99-3082. Plaintiff has thirty days from the date of this Order to submit an amended complaint, consistent with this Order. The Court GRANTS Defendant's motion to stay discovery pending a motion to dismiss the amended complaint.

Dated: APR 26 2000

CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
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for the
Northern District of California
April 26, 2000

* * CERTIFICATE OF SERVICE * *

Case Number:4:99-cv-03082
3109

Rucker

vs

Henderson

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 26, 2000, I SERVED a true and correct copy(ies) of attached, by placing said copy(ies) in a postage paid envelope sed to the person(s) hereinafter listed, by depositing said ope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Harold J. Rucker
419 Darien Avenue
Oakland, CA 94603

Susan L. Kamlet, Esq.
U.S. Attorney's Office
1301 Clay St Ste 340S
Oakland, CA 94612-5217

Richard W. Wieking, Clerk

BY: _____
Deputy Clerk

APPENDIX B

Harold J. Rucker, Pro per
419 Darien Avenue
Oakland, CA 94603-2121
(510)632-7727

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA, THIRD DIVISION

Harold J. Rucker,

Plaintiff,

v.

William J. Henderson,
Postmaster General of the
United State Postal Service.

Defendant.

Civil Action No. C 99-3082 CW

FIRST AMENDED RACE, COLOR AND GENDER DISCRIMINATION AND RETALIATION FOR FILING PRIOR EEO COMPLAINTS AND PURSUING JUDICIAL REMEDY

DEMAND FOR JURY TRIAL

COMPLAINT

RACE, COLOR AND GENDER DISCRIMINATION

1. This is a civil action brought and jurisdiction lies pursuant to Title VII of the Civil Rights act of 1964, Civil Rights Act of 1991, 42 U.S.C. secs 2000e et seq., venne lies in this District pursuant to 42 U.S.C.. sec 2000e-5(f)(3). In addition, this action seeks redress for violations of his rights guaranteed to the plaintiff by the Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C. sec. 621, et seq., and 42 U.S.C. sec. 2000(e), et seq. (Title VII).

2. Jurisdiction is invoked pursuant to 28 U.S.C. secs. 1331, 1346, 1361, 2201, and 2202. In addition, jurisdiction is invoked pursuant under the Age Discrimination Employment Act of 1967, as amended, 29 U.S.C. sec 621, et seq., and 42 U.S.C. sec. 2000(e), et seq. (Title VII).

3. Plaintiff, a Afro-American male, was employed by the United States Postal Service in Alameda, California. At all times relevant hereto, the plaintiff was employed by the defendant United States Postal Service as an postal carrier/router at the Alameda Post Office. He is a citizen of the

United States and is a resident of this District residing in the County of Alameda, State of California.

4. Defendant, United States Postal Service, is an agency of the Executive Branch of the Government of the United States of America.

5. Defendant Postmaster William J. August, at all times relevant hereto was employed by the defendant United States Postal Service as the postmaster of the Alameda Post Office. He is being sued individually as well as in his official capacity.

6. Defendant Warren G. Spencer, at all times relevant hereto was employed by the defendant United States Postal Service as the supervisor of customer service and mails at the Alameda Post Office and as such was the plaintiff's immediate supervisor. He is being sued individually as well as in his official capacity.

7. Defendant Laverne Pennix, at all times relevant hereto was employed by the defendant United States Postal Service as the supervisor of cutomer service and mails at the Alameda Post Office and as such was the plaintiff's immediate supervisor. He is being sued individually as well as in his official capacity.

8. All relevant events and transactions alleged herein in connection with the plaintiff's charges of discrimination occurred at the Alameda Post Office in the city of Alameda, California.

9. Plaintiff, a 43 year old Afro-American male, began employment with the Alameda Post Office on or about June, 1991, as a part-time postal clerk/carrier. In that capacity, plaintiff was responsible for sorting and delivery of the U.S. mail.

10. In 1992, plaintiff had applied to take supervisor training to become a supervisor in the near future. Defendant was told to complete an application and that the final decision was up to the Postmaster of Alameda Post Office, William J. August. Plaintiff's request was never responded to by Postmast August or plaintiff's immediate supervisor even after numerous request.

11. On or about January 22, 1994, plaintiff filed a claim with the Office of Workmen's

Compensation Program, hereafter referred to as the "OWCP", for inhalation of fiberglass and dust on the job which was accepted on March 30, 1995 as a traumatic injury and assigned claim no. 94603-123-1036710.

12. On or about November 30, 1994, while plaintiff was sorting mail, he felt a gradual build of muscle tension at the base of his neck in that the muscle tension continued as he continued sorting mail.

13. On December 5, 1994, while plaintiff was performing his regular duty casing mail he began to experience a gradual stiffness at the base of his neck and radiated through the shoulders that became too intense for the plaintiff to continue casing mail.

14. On December 5, 1994, the plaintiff filed an claim with the Office of Workmen's Compensation Program, form CA-1, Federal Employee's Notice of Traumatic Injury or Continuation of Pay/Compensation. The OWCP claim was assigned no. 94603-13-1064238 which subsequently was changed to OWCP claim no. 94603-13-1092154 after being accepted on October 5, 1995.

15. On or about December 8, 1994, plaintiff sustained a concussion, neck and back injuries while delivering mail in his mail vehicle. While stopped on a two lane street to make a left hand turn, the plaintiff was rear-ended by a vehicle.

16. On December 9, 1994, plaintiff filed a claim with the OWCP as a result of the injuries sustained in the vehicular accident.

17. Plaintiff was initially treated by Dr. Meredith Saunders, M.D. at Readicare Medical Center, the postal service's contracted medical facility for both the injuries sustained in the vehicular accident and the occupational injury claim.

18. Dr. Saunders prescribed modified work schedule that included breaks every 15 to 30 minutes and she suggested that the plaintiff have a stool to sit on periodically if it did not interfere with the plaintiff's work assignment.

19. Plaintiff is informed and thereon alleges that mail clerks who sort mail are provided with stools with adjustable heights sit or stand at their option whenever they case mail.

20. The defendant complied with Dr. Saunders' restrictions, by removing plaintiff off his regular assignment and assigned to sitting and doing nothing on a daily basis. Plaintiff was not assigned to do anything but sit and read the post office manual.

21. On or about January 13, 1995, plaintiff as referred to Dr. Hussan El Gohary, a physiatrist, at the Readicare Medical Center.

22. On or about January 25, 1995, Dr. El Gohary, suggested that the plaintiff continue with his collection route, however any activities that involved repetitive moment of the hands or arms, i.e. sorting mail, should be avoided.

23. Defendant were able to comply with Dr. El Gohary's restrictions but decline to do so. Plaintiff conveyed to Defendant Supervisor Spencer that he could and would prefer to work his assigned collection routes while he was undergoing therapy. Defendant Supervisor Spencer refused to allow the plaintiff to work his assigned collection routes as requested, instead plaintiff was order to sit and read and several occasions the plaintiff was ordered to sit in the middle of the workroom floor so all of plaintiff's co-workers could see him with nothing but a manual to read. Later plaintiff was assigned work tasks that appeared to be contrary to the doctor's work restrictions, i.e. avoid tasks that involved rapid repetitive hand and arm movement by being assigned to sort Undeliverable Bulk Business Mail hereafter referred to as "UBBM", which required rapid repetitive moment of the arms and hands, however, the plaintiff could take breaks as necessary to avoid the onset of muscle tension.

24. On or about March 20, 1995, plaintiff filed a claim with the OWCP for reccurrence of occupational injury which involved the inhalation of concentrated levels of dust while sorting UBBM . The original claim was assigned OWCP claim no. 94603-13-1036710.

25. Plaintiff is informed and believes and hereon alleges that the Defendants had previous

knowledge that sorting "UBBM" caused employees to have an allergic reaction due to previous employees complaining of symptoms associated with the sorting of "UBBM". Plaintiff continued to have sinus problems and problems with his cervical region in that repetitive movement of the arms in association with forward flexion of the neck caused muscle tightness followed by cervical pain and a severe headache, however plaintiff felt that he could do part of his assignment with minimal adverse affects. Plaintiff's request for reassignment in his letters dated April 5th and 7th, 1995, addressed to the Postmaster were denied without reason.

26. On May 2, 1995, the plaintiff was examined by Dr. Robert Ansel, a neurologist, as a result of Dr. El Gohary's referral and the approval of the OWCP.

27. Dr. Ansel's findings were in part are as follows; "This gentleman's clinical history and findings suggest a chronic periscapular musculoskeletal strain. Based on the information presented, I am accepting that the origin of his problem is the repetitive nature of his work. He is not yet permanent and stationary."

28. On or about May 2, 1995, a copy of Dr. Ansel's report was provided to the United States Postal Service, Oakland Injury Compensation Office.

29. On or about May 8, 1995, unknown to the plaintiff at the time, Ms Marietta Harris, Oakland Injury Compensation Office Official, generated a memo to the OWCP to Todd Bruininks, the plaintiff's claim examiner whereby she noted in the medical report that the plaintiff had a neck and lower back injury in 1982 in that his current back problem could be classified as, "an aggravation." Mr. Bruininks responded, "This claim is accepted for a strain, would you rather we accept for an aggravation of something more serious. I am sending this claimant for a 2nd op. (opinion) soon...then maybe we can end this claim." See Exhibit "A" attached hereto and made part hereof.

30. Plaintiff is informed and believes, thereon alleges that Ms Harris maintained regular communication with Postmaster August as to the plaintiff's medical information and status of the

plaintiff's current medical condition as conveyed to Ms Harris by the OWCP.

31. In the interim, on or about May 15, 1995, the plaintiff contracted a severe sinus infection as a result of sorting the UBBM which is always extremely dust-ridden.

32. On June 1, 1995, Plaintiff filed a CA-2, Federal Employee's Notice of Recurrence of Diability and Claim for Continuation Pay/Compensation with the OWCP. The claim was asigned OWCP claim no. 94603-13-1036710. The claim was subsequently accepted by the OWCP

33. On or about June 8, 1995, the plaintiff was notified that a second opinion examination was scheduled with Dr. Allan Halden, a orthopedic surgeon, on June 28, 1995.

34. On or about June 22, 1995, the Office of Federal Operation hereafter referred to as "O.F.O.", remanded a prior EEO complaint filed by the plaintiff in September 1992, back to that the "defendant agency" (USPS) for processing. The EEO complaint alleged discrimination by Ms Carolyn Seaberry, a supervisor at the Alameda Post Office under the supervision of the same postmaster, in that the defendant agency dismissed the allegations as moot upon the offending supervisor's transfer to the Oakland facility in 1993.

35. On or about ***July 24, 1995***, The agency issued a "Remand Acceptance Letter" to the plaintiff, attached hereto and marked as Exhibit "B" and made a part hereof, stating that the plaintiff's discrimination complaint was accepted for investigation.

36. On or about June 28, 1995, the plaintiff presented himself at the office of Dr. Allan Halden for an second opinion, a copy of his examination was submitted to the OWCP on or about July 3, 1995.

37. Dr. Halden's medical findings in part are as follows; "The claimant's physical limitations resulting from work related disability consist mainly of an inability to tolerate jobs of a repetitive nature with the same motions being done over and over again for hours at a time. This includes repetitive motions of the neck, arms and shoulders such s casing or other sorting of mail or prolonged reading as

he presently is doing reading postal manuals. He would also be precluded from looking up at the ceiling or looking down at the floor for prolonged periods or having a weight draped around his neck as with a postal satchel for delivery route."

38. On July 21, 1995, Defendant Supervisor Spencer approached the plaintiff and informed him that Dr. Hussan El Gohary, the treating physician from Readicare Medical Center, the postal service's contracted medical service provider, had released the plaintiff to perform full duty.

39. Unknown to the plaintiff, Defendant Spencer and Postmaster August had discussed plaintiff's medical condition with Dr. El Gohary in that they (Defendant Spencer, Posmaster August and Dr. El Gohary) had agreed among themselves to place the plaintiff back on full duty.

40. Plaintiff began sorting mail and approximately one half hour later he began to feel tightness at the base of his neck, which he ignored until the tightness appeared to spread to his shoulders. Plaintiff stated to Defendant Supervisor that he could not continue due to the pain.

41. Defendant Supervisor Spencer stated to the plaintiff that he was cleared by his treating physician and that he would have to obtain medical verification from his treating physician for work restrictions. Plaintiff complied.

42. On the same day plaintiff presented himself to Readicare Medical Center whereby he was told by Dr. El Gohary that there was nothing more that he could do for the plaintiff however he would request a Magnetic Resonance Imaging (MRI) and a Qualified Medical Examination (QME). See Exhibit "1" of Exhibit "D" attached hereto and made a part hereof.

43. Dr. El Gohary noted on the Readicare work status form that the plaintiff could return to full duty with no limitations or restrictions and he noted that the plaintiff's condition is permanent and stationary and plaintiff will have permanent residuals.

44. Upon questioning Dr. El Gohary what the notations meant and why he could not prescribe work restrictions, Dr. El Gohary stated, "I can't do anymore. I can not provide work restrictions."

45. On the same day plaintiff returned to the post office and informed Supervisor Spencer that Dr. El Gohary could not do anything else for him (plaintiff). Supervisor Spencer stated that the plaintiff would have to obtain medical verification from his own doctor. Supervisor Spencer also stated that the plaintiff would have to leave because he did not have any work for him to do.

46. Defendant Supervisor Spencer instructed the plaintiff not to return to work until he had medical confirmation. The plaintiff complied.

47. On *March 5, 1997*, the plaintiff was able to obtain a copy of his OWCP file, claim no. 94603-12-1092154 in that it contained a letter from Supervisor Spencer addressed to the Postmaster August reciting the events that had occurred on July 21, 1995. See Exhibit "C", attached hereto and made a part hereof.

48. Supervisor Spencer's letter inaccurately recites what had transpired on July 21, 1995, in that plaintiff was ordered to leave, plaintiff did not volunteer to use his sick leave and Supervisor Spencer did not advise the plaintiff not to hurt himself and to work in a safe manner. Plaintiff was ordered to sort mail and when he could not comply he was told to go home.

49. Plaintiff is informed and believes and thereon alleges that Supervisor Spencer knew or should have known at that time the correct procedure for the plaintiff to use to obtain a change in his treating physician from the Readicare physician to his own personal physician. Supervisor Spencer did not advise the plaintiff of how to change his physician of record at that time or prior to that time or any relevant times during the course of events alleged in this complaint.

50. Plaintiff is informed and believes and thereon alleges that Supervisor Spencer could have assigned the plaintiff to another job assignment and could have allowed the plaintiff to complete his route collections as he had in the past.

51. On July 25, 1995, the plaintiff had received a voice message on his recorder from

Supervisor Spencer instructing him to report to the Post Office's Medical Unit. Plaintiff called the medical unit to confirm the appoint time per his custom and practice. Plaintiff was told by Linda Armitage, the Head Nurse that no such appointment had been made.

52. Nurse Armitage contacted Dr. Wilson to confirm that he did not make an appointment. Dr. Wilson conveyed to me through Nurse Armitage that I should contact my claims examiner. Nurse Armitage suggested returning to Readicare as well.

53. On July 26, 1995, Supervisor Spencer stated to the plaintiff that he had personally talked with Dr. Wilson concerning the medical appointment, however Dr. Wilson must have forgotten.

54. On July 26, 1995, plaintiff had written to the OWCP outlining the above events to memorialize events because it appeared the plaintiff was being set up and protrayed as a poor performer for some type of disciplinary or dismissal purposes because of his efforts to pursue his EEO complaint and his pursuit of judicial proceedings after the administrative process of an EEO complant. Plaintiff requested that a medical expert be appointed to intervene and determine the plaintiff's physical condition and address what medical remedies are available to the plaintiff. See Exhibit "D".

55. On or about August 7, 1995, the plaintiff received a letter from Todd Bruininks, Claims Examiner with the OWCP, who provided a copy of the second opinion report from Dr. Halden and advised the plaintiff that he should file a occupation disease claim (CA-2). See Exhibit "E", attached hereto and made a part hereof.

56. Unknown to the plaintiff at the time, On or about August 7, 1995, Todd Bruininks also provided a copy of Dr. Halden's second opinion report to the United States Post Office, Injury Compensation Office, pursuant to Ms Marietta Harris's request. See Exhibit "F", attached hereto and made a part hereof.

57. On or about August 21, 1995, the plaintiff call the Alameda Post Office and had spoken directly with Supervisor Spencer. Plaintiff asked if he (Spencer) found out what the Oakland Injury

Compensation Department knew concerning medical information from Dr. Allan Halden, an orthopedic, employed by the OWCP for a second opinion. Supervisor Spencer stated that he would address the matter and call me back. Supervisor Spencer did not state to the plaintiff that he was being charged with AWOL or that any other disciplinary action was being contemplated.

58. On or about August 24, 1995, the plaintiff had called the post office to speak with Defendant Supervisor Spencer who was not there. Plaintiff had spoken with Eric Schiller, an acting supervisor, and asked Mr. Schiller to inform Defendant Supervisor Spencer that the plaintiff was still waiting for his reply concerning the medical information received by the Oakland Injury Compensation Department.

59. On or about August 26, 1995, the plaintiff received a certified letter from Supervisor Spencer stating that he was absent without leave and would be removed from the post office if he did not provide satisfactory information as to his absences.

60. On or about August 28, 1995, plaintiff returned to the post office at his regular reporting time. Defendant Supervisor Spencer was not present at the facility. Supervisor Luis Minna was on duty at the time and he had informed the plaintiff that Supervisor Spencer was on vacation and the postmaster was out of the facility. Plaintiff presented Supervisor Minna with medical documents from Dr. Halden and Dr. Ansel. Supervisor Minna stated that he would give them to Postmaster August.

61. Later the same day, Postmaster August was walking through the facility. Plaintiff approached Postmaster August and asked to confer with him so that he could address his medical problem with him in private. Postmaster August stated to the plaintiff that the plaintiff's doctor was the Readicare doctor and that he had cleared the plaintiff for full duty. Postmaster refused to confer with the plaintiff by stating that he did not want to hear it and ordered the plaintiff to go back to work. Plaintiff complied.

62. The plaintiff was unable to case mail due to the onset of muscle tension which was very

severe in intensity due to his ongoing attempts to sort mail. Unknown to the plaintiff, Postmaster August was glaring at the plaintiff until the plaintiff performed a stretch exercise and observed the Postmaster glaring at him. Upon the plaintiff making eye contact with Postmaster August, the plaintiff again attempted approach and explain to Postmaster August what he was experiencing, when Postmaster August again ordered the plaintiff to go to his case and get back to work.

63. Unknown to the plaintiff at the time, a letter from Postmaster August dated *September 28, 1995*, with an attachment "A" from Supervisor Spencer, addressed to the OWCP, established that on or about August 28, 1995 Postmaster August had instructed Supervisor Spencer to document the plaintiff's work performance which began on August 28 to August 31, 1995. See Exhibit "H", attached hereto and made a part hereof.

64. Postmaster August would later used the performance information as partial grounds for separating the plaintiff from the postal service stating that the plaintiff was a poor work performer in conjunction with the perfabricated allegation that the plaintiff was a threat to him and others.

65. Plaintiff is informed and believes, thereon alleges the Postmaster August provided false and misleading information to the plaintiff's physician of record to influence his medical opinion to prevent any work restrictions from being imposed in the plaintiff's behalf.

66. On or about August 30, 1995, plaintiff experienced severe muscles spasms that caused him to take an unscheduled break. Plaintiff was approached by Supervisor Munoz and ordered to return to casing mail. Plaintiff responded that he could not. Supervisor Munoz insisted the plaintiff take sick leave, in which the plaintiff did.

67. On or about September 8, 1995, the plaintiff responded to a letter from Postmaster August and again asked to be assigned to some meaningful duties that did not require the sorting of mail which appeared to be the origin of his pain. Postmaster August denied the plaintiff's request. See Exhibit "I", attached hereto and made a part hereof.

68. Plaintiff is informed and believes and hereon alleges that their was no set policy to denied plaintiff's request to be assigned to other duties because non-Afro-American employees were assigned different duties and provided eight hours of work as stated in the National Letter Carrier's Agreement.

69. On or about September 12, 1995, at approximately 14:00 hours the plaintiff was approached by Supervisor Spencer in that Supervisor Spencer wanted to talk to the plaintiff concerning AWOL. Supervisor Spencer also commented that he wanted to address the plaintiff sitting and sleeping in the mail case.

70. Plaintiff never slept at his mail case therefore plaintiff assumed that Supervisor Spencer's comments were stated to antagonized and annoy the plaintiff as were other statements of inaccuracies made by Supervisor Spencer concerning plaintiff's performance; falsely stating that he made an appointment for a Fitness For Duty examination with Dr. Wilson; denying that he sent the plaintiff home on July 21, 1995 and stating that he would check with the Oakland Injury Compensation Office for additional information concerning the second opinion medical.

71. Plaintiff indicated that he wanted to have a Union Representative present. Supervisor Lavern Pennix stated that the plaintiff did not need a Union Representative because it was an informal discussion.

72. Supervisor Spencer discussed the plaintiff's attendance and use of sick leave. Supervisor Spencer also told the plaintiff that he could not sit down. Plaintiff brought to Supervisor Spencer's attention that other clerks sat down and case mail. Supervisor Spencer insisted that the plaintiff stand while casing mail.

73. Plaintiff is informed and believes, and thereon alleges that Supervisor Spencer was aware of the plaintiff's medical condition through his contact with Marietta Harris, of the Oakland Injury Compensation Office, as well as being informed by Postmaster August and Dr. El Gohary.

74. Plaintiff further alleges that there was no policy or restrictions established to prevent the

plaintiff from sitting down to relief tension is his back, shoulders and nectk when necessary as non-Afro-American employees had done before and after the plaintiff's incident. aware that the plaintiff had to sit down to relief tension in his back, shoulders and neck when necessary.

75. On or about September 12, 1995, Defendant Supervisor Spencer had provided false information to the Union Representative Steven Yip in that he had told Mr. Yip that on July 22, 1995, the plaintiff had voluntarily left work when in fact he told the plaintiff that he did not have any work for the plaintiff to do and to leave.

76. On or about September 13, 1995, the plaintiff requested the number of the nurse in the medical unit to schedule a appointment for an examination. Supervisor Spencer said he would set up the appointment.

77. On or about September 14, 1995, the plaintiff requested information as to the date that Supervisor Spencer set up an appointment for the plaintiff to be examined. The plaintiff requested the telephone number to set the appointment up himself. Supervisor Spencer stated that he would provide the number to the plaintiff.

78. On or about September 15, 1995, the plaintiff could not proceed with sorting mail due to the pain in his back and shoulders. Plaintiff had to sit down. Supervisor Spencer observed the plaintiff and stated that the did not want the plaintiff to sit down on the job and stated that the limitations did not state he (plaintiff) have to sit down.

79. On or about September 15, 1995, plaintiff approached Supervisor Spencer and told him that he could not do his job under his present condition. Supervisor Spencer asked, "What's the problem, are you sick, are you in pain?" Supervisor Spencer then directed his attention to other individuals and walked off.

80. On or about September 15, 1995, plaintiff obtained the number to the Nurse Administrator, Linda Armitage, of the Postal Service medical unit and confirmed that Supervisor Spencer did not set

up an appointment for the plaintiff. The plaintiff asked that Nurse Armitage provide a statement that there was not an appointment arranged. Nurse Armitage complied. See Exhibit "J", attached hereto and made a part hereof.

81. On or about September 15, 1995, plaintiff confirmed with Eric Schiller that he did in fact give Supervisor Spencer plaintiff's message on August 21, 1995, concerning verification of the medical information from Dr. Halden that was provided to the Oakland Injury Compensation Department by the OWCP.

82. Plaintiff had discovered on September 15, 1995, from the note from Nurse Armitage, Exhibit "J", that Postmaster August on July 26, 1995 had attempted to make a Fitness For Duty Examination (FFD) for the plaintiff to found unfit for duty as grounds for dismissal. Dr. Wilson decline to make such an examination until after the second medical opinion ordered by the OWCP had been received.

83. Plaintiff alleges that Postmaster August knew on July 26, 1995, that the plaintiff had been scheduled for a second opinion medical examination by the OWCP and that any performance evaluations of the plaintiff would not be a fair assessment of plaintiff's performance and that the performance evaluation should be postponed until a final determination of the plaintiff's medical condition. Plaintiff further alleges that any work restrictions imposed by any subsequent physician prescribed should have been honored as are the work restrictions of non-Afro-American employee's physicians.

84. On or about September 18, 1995, the plaintiff presented another claim for an Occupational Disease upon the advice of Todd Bruinmks in his letter dated Angnst 7, 1995, (Exhibit "E"), to the OWCP through Defendant Supervisor Spencer. See Exhibit "K" attached hereto and made a part hereof. (Medical Reports from Dr. Halden and Dr. Ansel were omitted)

85. Supervisor Spencer stated to the plaintiff that he did not want the plaintiff to sit

on the job. Plaintiff stated it was necessary to sit down when he was experiencing back pain and that he needed to have the matter address through Dr. Wilson, the postal doctor. The plaintiff began to experience periods of extreme anxiety and anger from what appeared to be intentional discriminatory treatment from Defendant Supervisor Spencer.

86. On September 19, 1995, plaintiff presented himself to the Kaiser Occupational Medical Center. Plaintiff was diagnosed with an Adjustment Disorder with Depressed Mood.

87. On September 25, 1995, upon plaintiff return to work he presented the documentation to Supervisor Spencer to record his absence from work per medical purpose as he usually does. A copy of the industrial Injury visit verification is attached hereto and marked as Exhibit "Q" and made a part hereof.

88. On or about September 25, 1995, Supervisor Spencer informed the plaintiff that he had set up an appointment with the Employees Assistance Program (EAP). The E.A.P. assisted employees who had specific problems relating to alcohol, drugs or emotional problems. The appointment was of no assistance to the plaintiff.

89. Plaintiff is informed and believes, thereon alleges that the appointment with the (EAP) was pretextual in that the plaintiff was being set up to appear that he had an emotional or drug problem as grounds for dismissal.

90. Plaintiff further alleges that Supervisor Spencer made the appointment with the EPA per the instructions of Postmaster August as a ploy to demonstrate their attempts to resolve any emotional instability suffered by the plaintiff when in fact they were creating the conditions and environment for plaintiff's emotional instability.

91. On or about September 25, 1995, Supervisor Spencer, issued a warning letter to the plaintiff that required the plaintiff to bring a doctor's certificate for any absence. Plaintiff had always supplied a doctor's certificate when he used sick leave. See Exhibit "R" attached hereto and

made a part hereof.

92. Plaintiff is informed and believes, thereon alleges that the warning letter was pretextual in that the plaintiff was being set up in a fashion that demonstrated he was constantly abusing sick leave to be used later as grounds for dismissal, plaintiff always presented a medical appointment slip for his sick leave absences as a matter of defining sick leave usage.

93. On or about September 25, 1995, the plaintiff asked Supervisor Spencer what could be done in reference to his shoulder problem, Defendant Supervisor Spencer's response was "your on full duty status." The plaintiff informed Supervisor Spencer that the claim that he had filed with the OWCP and he was still doing the same activities that aggravated his condition.

94. Supervisor Spencer suggested contacting Marietta Harris. Plaintiff stated it would be inappropriate for the plaintiff to call when the officials in the Oakland Injury Compensation Office asked that only supervisors call, however Supervisor Spencer insisted that the plaintiff call.

95. Plaintiff called the office of Marietta Harris and left a message on her recorder. Ms Harris never returned the plaintiff's call.

96. Plaintiff is informed and believes and thereon alleges that Supervisor Spencer knew the procedure that a facility supervisor would have to contact the Oakland Injury Compensation Office per their request and he knew that Ms Harris would not return the plaintiff's call. Plaintiff further alleges that Supervisor Spencer insisted that the plaintiff call to further antagonize and annoy the plaintiff by purposely failing to perform those duties to assist the plaintiff address his medical concerns.

97. Plaintiff is informed and believes and thereon alleges that Supervisor Spencer failed to make any attempt to obtain accurate medical information from the Oakland Injury Compensation Office as a ploy to continue to harass and antagonize the plaintiff to get him to react in a violent manner for justification for dismissal.

98. On or about September 27, 1995, the plaintiff attempted to contact the OWCP once again

to obtain information concerning the extent of services available to the treating physician. A MRI was requested on July 26, 1995, however there was no reply from the OWCP.

99. On or about September 27, 1995, plaintiff was told by Dr. El Gohary that he was scheduling him for another examination with another orthopedic specialist, however he could not change the plaintiff's work status or prescribe any work restrictions. The plaintiff stated that his symptoms were getting worst and that he did not understand why he (Dr. El Gohary) could not prescribe work restrictions.

100. On or about September 29, 1995, the plaintiff had written a letter to Todd Bruininks, Claims Examiner of the OWCP, to express how serious the situation was becoming at the Alameda Post Office. The plaintiff was convinced that all of the events that had taken place since July 21, 1995 were orchestrated to procure documentation for his dismissal. See Exhibit "L", attached hereto and made a part hereof.

101. On or about October 2, 1995, the plaintiff was contacted by Todd Bruininks who personally granted the plaintiff permission to change his physician or record. See Exhibit "M", attached hereto and made a part hereof.

102. On or about October 3, 1995, the plaintiff had informed Supervisor Munoz that he had a appointment scheduled to see his own physician to address the muscle spasm problem. Plaintiff was asked by Supervisor Oscar Munoz to cancel his doctor's appointment due to a class being scheduled that the plaintiff must attend. Supervisor Munoz than asked the plaintiff, "What was assigned first the class or his doctor's appointment?" Supervisor Munoz became unreasonbly irate when the plaintiff responded that he was going to see his doctor.

103. Plaintiff alleges that the Supervisor Munoz and Postmaster August conspired to attempt to intimidate the plaintiff in cancelling his doctor's appointment in order to continue harassing the plaintiff by criticizing his work performance and taking notes of the plaintiff's failure to perform to standards to

be used later as grounds for his dismissal.

104. On or about October 4, 1995, the plaintiff was examined by Dr. Wesley Watkins, who diagnosed the plaintiff's problem as a left trapezial strain. Dr. Watkins imposed work restrictions on a work status report and scheduled the plaintiff for a return visit on October 10, 1995. See Exhibit "N", attached hereto and made a part hereof.

105. On or about October 4, 1995, the plaintiff presented a copy of the work status report to Supervisor Spencer.

106. On or about October 12, 1995, plaintiff was told by Supervisor Lavern Pennix that his documentation from his present physician was not acceptable and that the plaintiff's doctor's restrictions would not be honored.

107. Plaintiff asked Supervisor Pennix to place the refusal of his doctor's restrictions in writing, Supervisor Pennix did not comply.

108. On or about October 16, 1995, the plaintiff was approached by a acting supervisor, who stated to the plaintiff that his doctor's restrictions would not be honored.

109. Plaintiff is informed and believes, thereon alleges that the entire management staff was apprised of the plaintiff's medical condition and knew or should have known that they were in violations of the plaintiff's civil rights in denying and failing to honor the medical restrictions prescribed by his new physician of record when other employees with medical conditions similar to the plaintiff were not subjected to the same treatment and restrictions as the plaintiff.

110. On or about October 17, 1995, the plaintiff asked to take a break due to the muscle tension in his shoulders. He was told that he could not take a break by Supervisor Luis Minna.

111. Plaintiff asked Supervisor Minna to call the OWCP to rectify what appeared to be a breakdown in communication. Supervisor Minna refused.

112. On or about October 18, 1995, the plaintiff consulted with his treating physician, Dr.

Wesley Watkins who prescribed that the plaintiff remain off work until he could see, Dr. Blackwell an orthopedic specialist.

113. On or about October 19, 1995, the plaintiff presented a letter dated October 19, 1995, to Postmaster August that referenced his refusal to honor the plaintiff's doctor's restrictions.

114. On or about October 23, 1995, the plaintiff was examined by Dr. Blackwell, who prescribed work restrictions as to sorting mail.

115. On or about October 24, 1995, the plaintiff returned to work with his doctor's restriction of sorting mail. The plaintiff was told he would have to work the UBBM, without protective equipment or work the nixies which required repetitive motion. Plaintiff refused. Supervisor Munoz told the plaintiff that there was not any work for him, use his sick leave and go home and request repayment from the OWCP.

116. Plaintiff is informed and believes and thereon alleges that there were no policies or administrative reasons in place that prevented the plaintiff's from being assigned to his collection route, or any other assignment that did not require rapid repetitive sorting movements that involved the arms, shoulders and downward flexion of the neck.

117. Plaintiff alleges that the defendant ochestrated the policy to deny the plaintiff an assignment as a means of frustrating the plaintiff and denying him meaningful employment as enjoyed by other non-Afro-American employees similarly situated as the plaintiff.

118. Plaintiff offered to assist Jim Curran perform data entries, as he had done before, Supervisor Munoz indicated that he could not do that because it would be crossing crafts.

119. Plaintiff is informed and believes and thereon alleges that Supervisor Munoz's explanation that plaintiff could not do "data entry" because it was "crossing crafts" was pretextual because plaintiff was asked to sort UBBM which was a job regularly and normally assigned to Jim Curran. Plaintiff was never forbidden to do "UBBM" because it was "crossing crafts".

120. On or about October 25, 1995, the plaintiff called the OWCP to find out exactly what the procedure was in being set home. Plaintiff was not able to talk to anyone until October 30, 1995, whereby he was told that he should read the Federal Employees Compensation Act and contact his Union Representative.

121. On or about November 1, 1995, the plaintiff was called into Supervisor Les Guzman's office whereby she asked the plaintiff what was his restrictions and limitations.

122. Plaintiff explained the work restrictions as prescribed by Dr. Blackwell and explained that the plaintiff had an serious allergic reaction to heavy dust from the Undeliverable Bulk Business Mail (UBBM) in that plaintiff had to file a claim with the OWCP before management recognized the harmful affects of sorting UBBM without proper protection.

123. On or about November 3, 1995, Defendant Supervisor Spencer in the company of Supervisor Guzman offered to the plaintiff a limited job offer which in part consisted of sorting UBBM without protective equipment and sorting mail.

124. Plaintiff requested that his doctor be called and he wish to have a full-time union representative present during any further discussions concerning the limited job offer. Plaintiff's requests were denied.

125. Defendant Supervisor Spencer, together with and under the approval of Postmaster August and all the other named defendants, acted to create and maintain a hostile work environment for the plaintiff because of his race, color and gender by engaging in the above stated behavior that subjected the plaintiff to pain, mental anguish, frustration, dehabilitating and hazardous employment conditions, unequal employment conditions and disparate treatment and by other such actions too numerous to list in their entirety, but to which plaintiff will testify at the time of trial, and to which defendants are collectively put on notice through these activities of Supervisor Spencer, Supervisor Pennix listed here, which are sufficiently similar to the unlisted activities as to give notice as to all

activities of a similar nature, many if not all of which were reported to or were known by Postmaster William J. August.

126. Plaintiff alleges that the policies and practice described herein, denied the plaintiff of employment benefits, full compensation from his injuries sustained on the job, full retirement benefits and has subjected plaintiff to disparate treatment that no other non-Afro-American has been subjected to in that they were assigned duties that were within their medical restrictions and assigned to other jobs or given modified work assignments when they could no longer perform their regular assigned duties.

127. Plaintiff alleges that non-Afro-American males who had sustained injuries on the job had been assigned to different duties and job assignments before the plaintiff sustained injuries requiring a modification of his work assignment and after the plaintiff's medical condition warranted a change of work assignment or modification of duties.

128. Plaintiff alleges and charges that the defendants maintains and enforces a policy of discrimination against Afro-American males who have sustained on the job injuries, as compared to non-Afro-American male employees who have sustained on the job injuries by employing what appears to be a neutral policy of providing work assignments that fail to meet medical restrictions, denying medical restrictions provided by a treating physician, refusing to acknowledge medical information provided by the Office of Workman's Compensation Program and refusing to inform Afro-American employees of the proper method to address OWCP claims and failing to inform Afro-American employees of progess of their OWCP claims when requested.

129. Plaintiff alleges and charges that the Defendants maintains and enforces a policy of discrimination against Afro-American males, as compared to female employees in that they are not subjected to the same degree of harassment or conditions herein stated in this complaint as Afro-Americans males of a specific color and/or Afro-American males, female employees are not denied medical restrictions nor compelled to perform duties that their physicians or medical conditions

precludc.

130. Plaintiff alleges and believes that the evidence adduced in the investigation and hearing of his complaint together with such additonal evidence as he will develop through discovery and presented at trial herein, shows and will show that the Defendants have discriminated and continue to discriminate against Afro-American males and what appears to be racially neutral has had and will continue to have a disparate impact upon Afro-American males.

131. Plaintiff alleges and charges that the Defendants maintains and enforces a policy of discrimination against Afro-American males as compared to males and females in any other ethnic group included in the workforce at the Alameda Post Office as a method of prevention and discouragement of individuals filing and processing Workman Compensation Claims. Plaintiff alleges that by the Defendants preventing workman compensation claims the supervisory personnel obtain bonues, monetary rewards or other incentives.

132. Plaintiff is informed and believes and thereon alleges that the Defendants maintains and enforces a policy of discrimination against Afro-American males to promote and advance policies and practices of personal gain that are unrelated to business necessities.

133. Plaintiff further alleges that the Defendants single out the plaintiff because of his race and conspire to discriminate against him to advance their polices and practicer for personal gain unrelated to business necessities.

134. On or about November 25, 1995, Postmaster August requested that the plaintiff submit to a psychiatric examination.

135. On or about December 8, 1995, presented himself to Dr. Alan Cohen, a psychiatrist selected by the Postal Service, for a psychiatric examination.

136. Unknown to the plaintiff at the time of the psychiatric examination, the Defendants had submitted preselected documentation to the psychiatrist prior to the plaintiff's psychiatric examination.

137. Plaintiff was not provided with copies of the documentation prior or during the psychiatric examination.

138. On or about January 26, 1996, plaintiff was provided a copy of Dr. Cohen's findings. Plaintiff discovered that Dr. Cohen had been provided documentation that was not present to him.

139. Dr.Cohen noted in his report that he had received a large number of records which included "Fitness for Duty and/or records hand written, several depositions, internal memos from the U.S. Postal Service, written reports from the medical unit at the U.S. Postal Serice, Dept. of Labor reports for occupational disease and Employment Standards Workers' Compensation reports, summaries of events surrounding Mr. Rukcer's history of injuries on the job."

140. Plaintiff requested that the Defendants provide the same documentation or allow the plaintiff to copy the documentation that they provided to Dr. Cohen for his psychiatric examination.

141. Plaintiff is informed and believes and thereon alleges that all OWCP injury claims are submitted through the plaintiff's supervisor for processing. Any subsequent comments on the claim forms by the supervisors are not provided to the plaintiff for examination or comment.

142. Plaintiff wanted to provide the same documentation to a psychiatrist of his choice for an objective evaluation and second opinion.

143. Defendant responded by providing incomplete and duplicative documentation that did not coincide with the list of documents Dr. Cohen had stated he received for review.

144. Dr. Cohen interviewed the plaintiff for approximately sixty (60) minutes and examined the documentation supplied by the Defendants and subsequently found the plaintiff to have a paranoid personality disorder.

145. Plaintiff is informed and believes and thereon alleges that the Defendants provided selected documentation to their psychiatrist of their choice that would give the psychiatrist of their choice the impression that the plaintiff was a paranoid personality.

146. Plaintiff further alleges that the defendants provided said documentation to further their policy to discriminate against the plaintiff because of his race, color and gender for their personal gain by using the plaintiff as an example to demonstrate to other minorities group who comprise the workforce at the Alameda Post Office that plaintiff's race, color or gender does not prevent the defendants from violating an individual's civil rights.

147. Plaintiff was not examined by Dr. Wilson, the Postal Service's medical doctor or any other psychiatrist for a second opinion. Dr. Wilson merely agreed with Dr.Cohen's findings that a person with a personality disorder can not work at the Post Office.

148. As a result of the tactics employed by Defendants the plaintiff was terminated from the Post Office on or about March, 1996.

149. All prerequisites to the filing of this suit have been met, including the exhaustion of all administrative remedies. The United States Postal Service's final decision is attached hereto and marked as Exhibit "P", made a part hereof.

150. The effect of the policies and practices pursued by the defendants as alleged above has been and continues to limit, classify, and discriminate against the plsintiff in ways that jeopardized his job, deprived him of his employment opportunities, and otherwise adversely affect his status as an employee because of his race, gender and color.

151. Defendants' actions and inaction have created a hostile work environment, as defined by the courts construing Title VII, purposely designed and directed toward Afro-American males.

152. Plaintiffs is informed and believes, and based on that information and belief allege, that the discriminatory conduct of Supervisor Spencer, Supervisor Pennix and Postmaster August was willful, malicious, fraudulent, oppressive, and in conscious disregard of the rights of the plaintiff. As a result, punitive damage are appropriate in an amount according to proof.

WHEREFORE, plaintiff request that defendants be cited to appear in this action, and that after

trial by jury, a judgment be entered granting plaintiff the following relief:

1. Actual damages according to proof;

2. Punitive damages according to proof;

3. Mental anguish damages according to proof;

4. Pre-judgment and post-judgment interest at the legal rate;

5. Such other and further relief, to which plaintiff is justly entitled.

RETALIATION

153. Plaintiff herewith realleges and incorporates by reference Paragraphs 1 through 152 of this complaint as if set forth in full here.

154. Plaintiff had filed two previous EEO complaints. The first EEO Complaint involved Supervisor Carolyn Seaberry, a female supervisor, referring to the plaintiff as a "dumb ass man" and "stupid" among other things, and created a work environment that was unacceptable and intolerable.

155. The postal service hereafter referred to as the "agency", dismissed the complaint as moot, however the plaintiff appealed the agency's decision to the Office of Federal Operations, hereafter referred to as the "O.F.O.", on the grounds that the agency did not take any action to correct the harm that had been done or provide plaintiff with any compensation and/or assurance that the acts complained of would not happen again.

156. On or about June 22, 1995, the O.F.O. remanded the case to the agency after denying the agency's request for reconsideration of its (O.F.O.) decision.

157. On or about July 24, 1995, The agency issued a "Remand Acceptance Letter" to the plaintiff, attached hereto and marked as Exhibit "B".

158. Plaintiff is informed and believes and thereon alleges that the defendant had knowledge of the remand letter from the "O.F.O." because the same EEO Investigator was assigned to investigate plaintiff's EEO complaint.

159. Plaintiff is informed and believes and thereon alleges that the defendants named in this complaint were informed of the resurrection of the plaintiff's EEO complaint against Supervisor Seaberry as explained latter in this complaint and thereby defendants formulated a plan to retaliate against the plaintiff upon finding the right circumstances and conditions to perpetrate their scheme.

160. The second EEO complaint was filed in 1993, after plaintiff had applied for a GS-9 level electronic technician position which coincided with the plaintiff's experience and background interests in computers and high technology.

161. Despite plaintiff's scoring within the top twenty applicants and being qualified for the position, defendant denied the plaintiff the position. However, two white applicants who scored lower that the plaintiff and who were also qualified for the position were granted the vacant positions.

162. Plaintiff discovered that Supervisor Carolyn Seaberry, the supervisor that the plaintiff filed an EEO complaint against was assigned to the Oakland Facility in 1993. Plaintiff suspected that Supervisor Seaberry conveyed information to other supervisors at the facility who in turn disseminated the information to other supervisors thereby establishing a method of communication adversely affecting the plaintiff's interview for the Electronic Techicians position.

163. Plaintiff's contention became more of a viable probability when Supervisor Pennix, who was assigned to the Oakland facility before he came to the Alameda Post Office in 1994, approached the plaintiff on October 12, 1995 and stated to the plaintiff that his doctor's restrictions were not going to honored. When plaintiff asked for the denial in writing, Supervisor Pennix changed the subject, and stated to the plaintiff that he would be a router for a long time. Supervisor Pennix then stated that the reason why the plaintiff did not get the promotion (electronic technician position) was because he had "too much excessive baggage."

164. Plaintiff is informed and believes and thereon alleges that Supervisor Pennix term "excessive baggage" not only referred to the plaintiff's injury claims but also included the two prior

EEO complaints plaintiff filed against post office officials.

165. Plaintiff is informed and believes and thereon alleges that unlike the communication network between the OWCP and the Oakland Injury Compensation Center as demonstrated by Exhibit "A" and the communications conducted between the Postmaster, medical officials, OWCP Officials, supervisors and other postal officials, a communication network is established between supervisory officials intra and interfacility whereby derogatory information is disseminated concerning employees without their knowledge and ability to rebut.

167. Plaintiff recalls on or about September 27, 1995, Supervisor Pennix approached the plaintiff and asked him about what he had heard about the plaintiff comming in off the street and requesting a supervisor's position. Defendant Pennix described the boots that the plaintiff had worn in 1991-1992 before he purchased regulation shoes and recited the fact that the plaintiff had always worn a shirt and tie to work, which was true.

168. Plaintiff alleges that a communication network exist whereby postal officials monitor and maintain information concerning employees and especially those employees who file EEO complaints for retalitory purposes.

169. Plaintiff is informed and believes, thereon alleges that postal personnel who process the EEO complaints are permanent staff personnel. Each EEO complaint is assigned an investigator who is a member of the permanent staff, who in turn contacts the complaining party at his or her facilty to conduct an informal interview.

170. Plaintiff is informed and believes, thereon alleges that the EEO Investigator is recognized by name or face by all Postmasters and supervisory personnel. Even if the Postmaster or supervisory personnel did not recognize the EEO Investigator, the EEO Investigator must identify himself or herself as an EEO Investigator and identify the nature of his business and who he or she is there to interview.

171. Plaintiff further alleges that the supervisor who is in charge of the complaining party is

alerted of the nature of the EEO investigators visit as well as other supervisory who recognize the EEO staff personnel and procedure.

172. Plaintiff is informed and believes, thereon alleges that retaliation from the Defendants for filing an EEO complaint against a postal official is on going and continues until such time that a situation or event can be used to harass, severely discipline or dismiss the individual who filed or pursued EEO complaints.

173. Plaintiff is informed and believes, thereon alleges that individuals who pursue judicial remedies after the EEO administrative process has been completed experience unfounded harassment, unwarranted disciplinary action and in extreme instances prefabricated and trumped up reasons for dismissal. Plaintiff submits the following evidence in support of his contention

174. Plaintiff had completed the adminstrative process of his second EEO Complaint that was lodged against the Post Office and pursuant to the right to sue letter, on or about December 15, 1994, filed a complaint for Discrimination In Hiring Practice, Discriminatory Salaried Position Requirement, Retaliation For Prior EEO Activity, Conspiracy Not To Hire, Negligence in District Court, case no. C 94-4299 CW.

175. In February, 1995, plaintiff was assigned to sort "UBBM" by the Defendants. Defendants had prior knowledge that concentrated levels of dust were harmful to the plaintiff due to a prior adverse reaction plaintiff had to concentrated levels of dust due which required the plaintiff to file an OWCP. Plaintiff also informed Defendants of his allergic reaction and provided documentation substantiating the same.

176. Plaintiff is informed and believes and thereon alleges that the Defendants assigned the plaintiff to sort "UBBM" as a means of retaliation against the plaintiff for filing prior EEO complaints and judicial proceedings against the Post Office.

177. Plaintiff further alleges that the Defendants knew that the plaintiff would request protect

equipment to prevent the onset of any further allergic reactions. Plaintiff is informed and believes and hereon alleges that the Defendants supplied inadequate protective equipment knowing that the plaintiff would reject to make it appear that the plaintiff was being uncooperative.

178. On or about May 17, 1995, the Oakland Postal facility submitted an employee evaluation form in reference to the electronic technician (ET-9) postion as a matter of routine to the Almaeda Post Office. Plaintiff's immediate supervisor, Warren Spencer, completed the evaluation form. A copy of the evalution is attached hereto and marked as Exhibit "S" and made a part hereof.

179. Supervisor Spencer noted that the plaintiff's accuracy was "good" and the plaintiff was "very thorough." Supervisor Spencer also indicated that the plaintiff's reliability, conduct and cooperativeness was also "good."

180. Supervisor Spencer was aware of the plaintiff's lawsuit against the Post Office because plaintiff informed him as well as other supervisors who were aware the plaintiff was seeking a promotion to the ET-9 position that no reasonable offer or progress had been made as to the EEO complaint and the plaintiff would pursue the matter though the judicial process.

181. Plaintiff alleges that the complaint is a matter of public record and if any one wanted to find out about the progress of the plaintiff's complaint the court records were accessible to them.

182. Plaintiff is informed and believes, thereon alleges that Supervisor Spencer provided inaccruate information to the plaintiff and failed to follow through on obtaining vital information concerning the plaintiff's OWCP claim as a form of retaliation and harassment knowing that the plaintiff took exceptional care to be accurate and thorough in and about his business.

183. Plaintiff further alleges that Supervisor Spencer knew that providing incomplete and inaccurate information concerning plaintiff's health matters would create anxiety, stress and frustration because this was conveyed to Supervisor Spencer verbally by the plaintiff and expressed in a letter written to Postmaster August.

184. On July 10, 1995, plaintiff filed an amended complaint alleging Discrimination in Hiring, etc.

185. On or about July 21, 1995, defendants initiated a series of actions as alleged herein this complaint that caused the plaintiff to seek profession medical assistance to wit: (1) The Defendants refused to reassign plaintiff to duties that would reasonably accommodate his medical condition, despite plaintiff's reasonable requests for and the availability of other duties; (2) the assigning of plaintiff to duties that entail continuous repetitive rapid motion; and aggravation of allergic rhinitis (3) issuance of letter of reprimand for unsafe act; (4) issuance of a restricted sick leave letter that required plaintiff to bring in doctor's slip for absences; (5) refusal to provide plaintiff with information how to change physician; (6) refusing to accept medical information from plaintiff's new physician of record; (7) sending the plaintiff home and stating that an physical examination will be conducted, then charging the plaintiff with AWOL for his absences while waiting the physical examination; (8) Supervisor Spencer denying sending the plaintiff home; (9) failing to contact Oakland Compensation Office to obtain current information concerning status of OCWP claim. This list is not conclusive.

186. Plaintiff began developing symptoms of memory loss, anxiety, extreme fustration and inability to control emotions.

187. During this particular time plaintiff was attempting to conduct discovery. Plaintiff's ability to conduct a thorough and effective discovery was seriously hampered as was his ability to proceed with those matters associated with prosecuting his complaint efficiently and effectively.

188. Plaintiff was hampered by the harassment at the Alameda Post Office and could not obtain the required evidence to show the link between the agency's pattern of harassment of employee's who had filed EEO complaints against postal officials.

189. Plaintiff was so devastated by the constant harassment at the Alameda Post Office that he could not remember information concerning his past in addition he found it very difficult to understand

the legal theories that he would have to use to proof his case at trial.

190. On September 19, 1995, plaintiff presented himself to the Kaiser Occupational Medical Center. Plaintiff was diagnosed with an Adjustment Disorder with Depressed Mood.

191. On September 25, 1995, plaintiff returned to the Alameda Post Office and presented his medical slip to Supervisor Spencer.

192. On the same day Supervisor Spencer issue a letter of Restricted Sick Leave which is normally issued to individuals who abuse sick leave and use sick leave without bringing in documentation to verify their absences. Plaintiff has always provided documentation for his absences whether medically or otherwise. A copy of the letter is attached hereto and marked as Exhibit "R" and made a part hereof.

193. Plaintiff is informed and believes and thereon alleges that the adverse effects that he had experienced from the events alleged in this complaint had a long term effect in that during trial in May, 1996, plaintiff began to sob and cry uncontrollably during his testimony.

194. Plaintiff continues to feel mental anxiety in having to remember the details of those events that had transpired at the Alameda Post Office during the relevant times noted in this complaint.

195. On September 13, 1995, plaintiff was asked by Supervisor Spencer to do collections in [illegible] the plaintiff complied. Upon the completion of the collection the plaintiff preceded to the rear to unload the vehicle. The plaintiff opened the sliding cargo door at the rear of the truck which did not stay in the fully up position. Plaintiff did not notice that the door was not fully parked when he climbed into the rear compartment to unload the truck.

196. Plaintiff struck his head lightly on the leading edge of the door without sustaining any injury. Plaintiff pushed upon the cargo door to fully park it and it would not stay. The matter was reported as a maintenance problem to Supervisor Spencer to have the truck's cargo door tension springs examined and adjusted for proper tension.

197. On September 28, 1995, plaintiff was issued a letter for an unsafe act for stricking his head on the cargo door. See attachement marked as Exhibit " T" attached hereto and made a part hereof.

198. Plaintiff is informed and believes and thereon alleges that because plaintiff filed several EEO complaints against the agency, specifically against supervisors who the plaintiff felt had violated his civil rights, defendant by and through its agents, servants and employees, had subjected plaintiff to harassment in refusing to assign plaintiff to assignments within his medical restrictions as was done with employees with the same or similar type of injury before the plaintiff sustained any injury and after the plaintiff sustained an injury.

199. Plaintiff further alleges that the defendants used a practice and policy of denying the plaintiff meaningful assignments to accomodate his medically restrictive condition, refusing to accept medical specialist's reports as to the plaintiff's physical condition; Insisting that the plaintiff perform tasks that caused him extreme pain and possible permanent physical damage; Refusing to accept current medical information from the plaintiff's current physician under the pretext that he was not the plaintiff's physician of record; Subjecting the plaintiff to performance evaluations during the time and period that the plaintiff was under medical care which substantially reduced the plaintiff's productivity as to sorting mail and subsequently using the performance evaluation in support of the plaintiff's dismissal and refusing to reasonable accommodate the plaintiff as it has with other employees whom had suffered similar job related injuries as a form of retaliation to adverse effect the outcome of his [illegible] to intimidate the plaintiff into quitting or provoking the plaintiff to perform some act of violence to use as grounds for dismissal.

200. Plaintiff is informed and believes and thereon alleges that the plaintiff was retaliated against for filing EEO complaints against postal officials and or proceeding with judicial process against the post office when he was subjected to a Fitness For Duty medical examination whereby

preselected documentation was provided to the examining psychiatrist to make it appear as if the plaintiff was a paranoid personality and dismissed from the postal service.

201. Plaintiff alleges that the Defendants purposely provide select documentation to influence the outcome of a Fitness For Duty medical examination to oust the plaintiff from the postal service and failed to provide the plaintiff with the same documentation for a second opinion to rebut the examining psychiatrist's findings.

202. Plaintiff further alleges that it is the defendant's practice and policy to use tactics such as withholding information, purposely providing false and misleading information and creating situations adverse to employees who file EEO complaints as a form of retaliation.

203. Plaintiff has exhausted his administrative remedies and seeks a judicial remedy.

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Award against the named Defendant and in favor of the plaintiff actual damages for loss of revenue including front and back-pay, further earnings and pension adjustment.

2. Award against the named Defendant and in favor of the Plaintiff compensatory damages for mental anguish, personal suffering, professional embarrassment and public humiliation the sum of three hundred thousand dollars ($300,000.00).

JURY DEMAND

Plaintiff herein demand trial by jury as to all issues so triable.

Dated: May 22, 2000

Harold J. Rucker

HAROLD J. RUCKER, PRO PER.

VERIFICATION

I, HAROLD J. RUCKER, declare under the penalty of perjury under the laws of California that I have read the foregoing complaint and that it is true to be best of my knowledge and for those matters

that are alleged under information and belief, I believe those matters to be true. I also certified that all exhibits attached hereto this complaint are exact copies or the originals.

HAROLD J. RUCKER, PRO PER

2-Way Memo

Subject: HAROLD RUCKER
13-1064238

F16

To : OWCP

INSTRUCTIONS
Use routing symbols wherever possible.

SENDER (Originator of message):
Use brief, informal language.
Conserve space.
Forward original and one copy.

RECEIVER (Replier to message):
Reply below the message, keep one copy, return one copy.

DATE OF MESSAGE	ROUTING SYMBOL
5/8/95	

SIGNATURE OF ORIGINATOR
Marietta Harris

TITLE OF ORIGINATOR
Human Resources Spec.

FOLD MESSAGE

Please note this medical indicates Mr. Rucker had an automobile accident in 1982 injuring his neck and lowerback. This was prior to his employment with the Postal Service and before being fired as an Air traffic controller.

Perhaps if there is a current back problem it is only an AGGRAVATION....

Thanks.

REPLY

This claim is accepted for a strain. Would you rather we accept for an aggravation of something more serious? I am sending this claimant for a 2nd op soon... then maybe we can end this claim.

DATE OF REPLY	ROUTING SYMBOL
5/24/95	

SIGNATURE OF REPLIER

TITLE OF REPLIER
CE

From : INJURY COMPENSATION OFFICE
1675 7th STREET ROOM 238
OAKLAND CA 94615-5445

OPTIONAL FORM 27 (Rev. 7-91)
GSA FPMR (41 CFR) 101-11.8

EXHIBIT A

UNITED STATES POSTAL SERVICE

July 24, 1995

Mr. Harold Rucker
419 Darien Avenue
Oakland, CA 94603-2121

Certified No.P 802 213 773
Return Receipt Requested

Agency No. 5E-1316-92
No. OFO Appeal 01940868

REMAND ACCEPTANCE LETTER

Dear Mr. Rucker:

Pursuant to the Equal Employment Opportunity Commission (EEOC), Office of Federal Operations (OFO), Decision of June 22, 1995, your formal complaint of discrimination filed on September 22, 1992 has been accepted for investigation.

Issue(s): The scope of the investigation will be as set forth in the June 22, 1995 OFO decision which instructs the agency to redefine appellant's complaint as encompassing the numerous occasions of harassment and the allegation that appeallant was subjected to discriminatory standards of performance as detailed in appellant's statement.

Date(s) of Incident: March through August, 1992

Bases of Discrimination: Age (DOB 4/21/51) Sex (M)

If you do not agree with the defined issues, you must provide sufficient reasons, in writing, to substantiate your objections within seven (7) calendar days of your receipt of this letter. Your objections should be sent to the address in the signature block with a copy sent to the EEO Office in which you filed your formal EEO Complaint. Your complaint has been assigned to an EEO Investigator. Please be prepared to go forward with your complaint when the investigator contacts you.

The investigation will be completed within time frame specified in the OFO decision.

EXHIBIT B

When the investigation is completed, you will receive a copy of the investigative file, and you will be notified of your right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge or of your right to a final decision by the agency head or designee without a hearing.

You may request a hearing by an EEOC Administrative Judge by notifying, in writing, the U. S. Postal Service EEO Office in which you filed your complaint, within 30 calendar days of your receipt of the investigative file.

If you are dissatisfied with the final decision of the Postal Service you may appeal to the OFFICE OF FEDERAL OPERATIONS, EQUAL EMPLOYMENT OPPORTUITY COMMISSION, PO BOX 19848, WASHINGTON DC 20036-9848, within 30 calendar days of your receipt of the decision, or you may file a civil action in an appropriate U. S. District Court within 90 calendar days of your receipt of the decision.

If you appeal to the EEOC, you must submit proof to the EEOC that a copy of the appeal and supporting documentation were also submitted to the EEO COMPLIANCE & APPEALS COORDINATOR; PACIFIC/WESTERN AREAS, 850 CHERRY AVE; SAN BRUNO CA 94099-4402. You may file a civil action in an appropriate U. S. District Court within 90 calendar days after your receipt of the EEOC's decision. If you do not receive a decision on your appeal within 180 calendar days from the date of your appeal, you may file a civil action.

After 180 calendar days from the date of filing your formal complaint, you may file a civil avtion in an appropriate U. S. District Court if the Postal Service has not issued a final decision on your complaint.

Sincerely,

William W. Norris

William W. Norris
Acting Appeals Review Examiner/Analyst
Pacific/Western Areas
850 Cherry Avenue
San Bruno, CA 94099-4402

cc: Sr. EEO Complaints Processsing Specialist

EEOC OFO Compliance Officer

UNITED STATE POST OFFICE

DATE: July 24, 1995

OUR REF: SCS:WSPENCER:np:94501-9998

SUBJECT: HAROLD RUCKER

TO: WILLIAM AUGUST
POSTMASTER
2201 SHORELINE DRIVE
ALAMEDA CA 94501-9998

On July 21, 1995, at approximately 11:00 A.M., I informed Mr. Harold Rucker that his doctor, Dr. Hussam Elgohary had returned him to full duties without limitations or restrictions at that time. Mr. Rucker said, "OK, I'll give it a try". He then returned to his duty assignment. After about 30 minutes working on his regular assignment, he returned to my desk stating he was unable to perform his regular duties without work limitations. Then I reminded him what the doctor stated on his work status report. He still insisted he could not perform his regular duties without work limitations. I then informed him that he would have to return to his doctor for an update on his limitations and work status. He then clocked out and went to ReadiCare in Oakland.

He returned about an hour later with an updated work status sheet from Dr. Elgohary stating, the patient was able to return to full duty with no limitations or restrictions. At that time I instructed Mr. Rucker to return to his assignment and start performing his duties. He then stated regardless of what the doctor has stated, he still cannot perform any duties without limitations. I advised him that he would have to perform his duties as the doctor has ordered or bring me documentation stating his new work status. Mr. Rucker then said, "I'll give my assignment one more try without limitations". I then advised him that I did not want him to hurt himself and to work in a safe manner and he agreed.

About five or ten minutes later, he approached my desk and stated he was unable to complete his assignment without limitations and he wanted to take sick leave to see his doctor. I then instructed him to bring documentation that he had seen a doctor. Also upon his return, to be prepared to go back to work without limitations or restrictions, or bring in a new work status report stating his new limitations.

WARREN SPENCER
SUPV CUSTOMER SERVICES

EXHIBIT C

RECEIVED
6 SEP 1995

July 26, 1995

C66

Attn: Todd Bruininks, Claim Examiner
U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs
71 Stevenson Place, P.O. Box 3769
San Francisco, CA 94119-3769

Re: File No. 94603-13-1064238 - CGB
Subject: Medical Expert Intervention

Dear Mr. Bruininks;

I have been seen by the Post Office contracted medical facility, Redicare, for the injury incurred on November 30, 1994. The injury was one of gradual occurrence that manifested itself on said date of injury.

At the onset I had been seen by Redicare's orthopedic specialists, Dr El Gohary, whom appeared to be most knowledgeable of my condition. The condition is that of cervical muscle tension brought on by the repetitive moment of the arms in conjunction with the partial forward flexion of the neck. The forward flexion of the neck position is assumed while I am sorting mail, and my arms are constantly moving back and forth to place mail in the appropriate slots. I have attempted to modify my head position to the straight forward position, however the same symptoms of cervical tension continues to occur.

The medical doctor from Redicare cleared me to return to work on July 5, 1995, I was finally told by my supervisor that I may return to full duty July 21, 1995. Upon performing the sorting of the mail with the repetitive arm movements, once again I had developed the same symptoms that I had experienced before. However this time the symptoms occurred a lot sooner than before. It is my opinion that the reason why the symptoms were brought on so much quicker is that I had not been active enough to keep myself conditioned. It was the practice of management to position me in a conspicuous position in front of everyone (workforce) and just sit there and read. I was told that I must just sit there and read dispite my numerous requests to be assigned to do part of my assignment. This continued for three to four months.

I had informed my supervisor that I was having the same symptoms as before. My supervisor told me to return to Redicare and obtain documentation concerning my medical condition. I had immediately returned to Redicare the same day where I had spoken with Dr. ElGohary, who indicated that he could not change my work status. Please find enclosed the last work status report from Dr. ElGohary, please note that he indicates on the form that I can return to work under no restrictions however, the condition that I had complained of still exist.(Exhibit 1)

EXHIBIT D

I had returned to work and presented the work status form to my supervisor, who instructed me to return to work. I complied, and developed the same results as before. I told my supervisor that I could not continue, he inform me that I would have to go home and contact my medical doctor for medical information that would substantiate my claim. I had attempted to explained that I was willing to keep trying but I could not perform without reducing my productivity. I had tried to sort at a reduce rate, but the tension in my shoulders and neck began to reach a point of intolerance. I was then sent home under the same conditions previously mentioned. Go to my doctor and get medical confirmation.

After I had wasted two and one half days of my sick leave getting the run around from my employer and Postal Service Injury Compensation Department, I had finally learned through Kaiser that I had to write and ask for permission to change my medical provider. The information was confirmed through the Postal Medical Nurse who suggested that I ask for a Nurse to help resove this confusing and frustrating situation.

On July 25, 1995, I was told by my supervisor that I should report to the Post Office Medical Unit on 7th Street to report to Dr. Wilson. When I called to confirm the appointment the Nurse indicated there was no such appointment. She went as far as to call Dr. Wilson to confirm the information with Dr. Wilson that he indeed did not set up an appointment for me. It was his advice that I contact my claim's examiner.

I have been given erroneous information from Supervisor Spencer as to how obtain release from the Post Office's contracted medical provider to seek medical attention from Kaiser, my medical provider. In addition he has erronously indicated that he has personally talked with Dr. Wilson in terms of him setting up an appointment, then on July 26, 1995, he tells me that Dr. Wilson forgot to set up the appointment. This is reminiscence of the type of tactics used by supervisors at the Alameda Post Office.

On July 26, 1995, I had presented myself to Redicare as suggested by the Postal Nurse. I had explained the situation to the treating physician who was willing to call the Postmaster at Alameda to see if we could reach some type of compromise as to my work situation. It has been my contention and that of that particular treating physicians that I could do duty task that did not involve repetitive movement of the arms and constant neck flexion. After the physician talked with the Postmaster, it was then his understanding that the Postmaster's opinion that I was faking it, that I constantly complained about my work assignments and that I would be a threat driving a vehicle.

It is true that I have been concerned about my work assignments because, it has been proven on numerous occasions that the supervisors will assign you duties that are contrary to your work limitations, i.e., if you have problems with repetitive movement of the arms, they will assign you light duties that involves just that exact limitation. You must speak up or you will be causing yourself additional injuries. The types of tactics that management uses to control individuals is appalling.

I have subsequent been told by a supervisor that because I could not do my entire assignment, I could not do the part of my assignment that I was cleared by the doctors to perform. I had to do all of the assignment or nothing at all. This is not only contrary to good management also it is contrary to the Letter of Agreement between Management and the Union. I have on numerous occasions asked why I was just sitting doing nothing but reading, when I could be keeping up my physical condition by staying active by doing collections. Their excuse was that turning my head to check traffic clearance was a repetitive movement and I would be collecting mail from the boxes which is a repetitive movement, which is unsubstantiated by any medical evidence of treating physicians. It actual comes down to the understanding of the actual mechanics that management is attempting to use in their defense without substantial support, i.e. the repetitive movement that is the causation of my problems is different from that of driving, movements involved in collecting mail and the pretextual concerns of the Postmaster. Movements per minute, position of neck and head play a significant part in the physician's determination that I am capable of performing some of my duties such as driving and collecting of mail without causing any danger to myself or others.

I am basically caught in the middle of a situation that appears to be a power struggle between management and good medical advice. I am not going to compromise my health to allow the perpetuation of poor management tactics. I respectfully request that an open discussion of management's concerns be brought to the attention of myself and the treating physicians mediated by a neutral party. It is my opinion that a compromise can be reached. If not, than I request that a Medical Expert approved by the OWCP intervene in this matter.

In the interim, I have been seen by Dr. Allan Halden, M.D. on June 28, 1995. I respectfully request a copy of his report.

Thank you for your prompt attention to this matter.

Sincerely,

Harold J. Bricker

READICARE WORK STATUS
Time In: 11:44 Time Out: _____

ATTENDING PHYSICIAN'S REPORT
Date of this Exam: 07-21-1995

Current Diagnosis: Cervical Strain R/O Disc Herniation ICD-9-CM Code: 847.0

Employee: RUCKER, HAROLD
Patient No: 302465770
Account No: 02-91424

Patient Social Security #: 302465770
Date of Injury(ies): 11/30/1994
Claim Number: NONE

Next Exam-
Date: after MRI
Time: _____

Employer: U.S. POSTAL SERVICE
1675 7TH ST. RM 237, OAKLAND, CA
Zip: 94615

099921

Employer: U.S. POST OFFICE
Phone: 510-748-5370

#057052

PATIENT STATUS

nce the last exam, this patient's condition has:

_____ improved as expected. _____ improved, but slower than expected. _____ not improved significantly.
_____ worsened. _____ plateaued, no further improvement expected. _____ been determined to be non-work related.

Briefly describe any change in objective or subjective complaint: _____

TREATMENT.

reatment Plan: (only list changes from prior status) _____ No Change _____ Patient is/was discharged from care on _____

Medications: _____ Instructions: _____

Therapy: Type PT __ OT __ Other _____ Times Per Week: ____ for ____ weeks.
__ Mon __ Tue __ Wed __ Thu __ Fri Est. Date of Completion: _____

Hospitalization/Surgery/Diagnostic Studies: MRI Cervical Spine R/O Disc Herniation

Referred to: _____ Date: _____ Time: _____

WORK STATUS

The patient has been instructed to: Estimated date patient can return to full duty: _____

_____ return to full duty with no limitations or restrictions.
_____ remain off the rest of the day and return to work tomorrow:
____ with no limitations or restrictions: ____ with limitations listed below.
_____ modified work (if available) with limitations listed below.
_____ return to work on _____

Work Limitations: __ Lifting _____ lbs. __ Pushing __ Climbing __ Standing __ Walking
__ Bending __ Pulling __ Reaching __ Squatting __ Minimal use of _____
__ Other _____
_____ remain off work until _____

DISCHARGE & DISABILITY STATUS

_____ Patient discharged.

Please supply a brief narrative report if any of the below apply:

_____ Patient will be permanently precluded from engaging in his/her usual and customary occupation.
_____ Patient's condition is permanent and stationary.
_____ Patient will have permanent residuals. _____ Patient will require future medical care.

Needs DME

Physician's Signature: _____ Date: 7/21/95

Physician's Name: Hussam El Gohary M.D.
(Please print)

READICARE Center OAKLAND
7817 OAKPORT ST
OAKLAND CA 94621

EXHIBIT 1

READICARE'S SUBSTANCE ABUSE SCREENING PROGRAM CAN PROVIDE A DRUG FREE WORK FORCE.

U. S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
P.O. Box 3769
San Francisco, CA 94119
(415) 744-6610

August 7, 1995

File Number: 94603-13-1064238
Date of Injury: 11-30-94
Employee: HAROLD RUCKER

HAROLD RUCKER
419 DARIEN AVE
OAKLAND CA 94603

Dear Mr. Rucker:

Here is a copy of the second opinion report from Dr. Halden. As you can see from the report, it appears that your condition is the result of cumulative stress, involving more than one work shift. As the above claim was accepted as a traumatic injury, it would be appropriate for you to file a new claim for occupational disease (form CA-2).

As for your concerns voiced in the July 26, 1995, letter, please be advised that this Office has no provisions for performing the activities suggested. These would be more readily addressed through your union or through EEOC.

Thank you for your attention.

Sincerely,

Todd Braininks
CLAIMS EXAMINER

US Postal Service
Oakland Division
Attn: Injury Compensation
1675 7th St Room 208
Oakland CA 94615

EXHIBIT E

2-Way Memo

Subject: [redacted] RICKER
[redacted]-13-1064238

To : OWCP

SENDER (Originator of message):
Use brief, informal language.
Conserve space.
Forward original and one copy.

RECEIVER (Replier to message):
Reply below the message, keep one copy, return one copy.

DATE OF MESSAGE	ROUTING SYMBOL
7/27/95	

SIGNATURE OF ORIGINATOR
Marietta Harris

TITLE OF ORIGINATOR
Human Resources Spec,.

FOLD

MESSAGE

In accordance with 20 CFR 10.104, please submit a copy of the medical report f[illegible] the June 28, 1995 second opinin evaluation by Dr. Halden and a copu of the OWCP-5.

Thank you,

Marietta

REPLY

Per your request...

DATE OF REPLY 8/7/95 ROUTING SYMBOL

SIGNATURE OF REPLIER

FOLLOW-UP DATE

CF

From :

EXHIBIT F

OPTIONAL FORM 27 (REV. 7-91)
GSA FPMR (41 CFR) 101-11.6
NSN 7540-00-000-3447

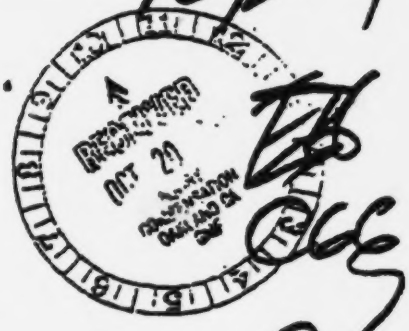
GGB

ReadiCare™
Medical Center

P.O. Box 2457, Santa Clara, California 95055-2457

7817 Oakport Street
Oakland CA 94621
(510) 638-0701

109154



August 4, 1995

CLAIMS EXAMINER
U S POSTAL SERVICE
1675 7TH ST RM 237
OAKLAND CA 94615

Employee:	Harold Rucker
Employer:	U.S. Post Office
Date of Injury:	12/8/94
Date of Examination:	7/21/95
ReadiCare No:	02-91424

Dear Claims Examiner:

Mr. Rucker returns today with reference to his neck pain. There has been a discussion between me and Mr. August, Mr. Rucker's supervisor. The plan was for me to go and visit the office to witness the working conditions and make some recommendations, but Mr. Rucker presented today and indicated that he is having neck pain.

It is my impression from talking with the supervisors at the U.S. Post Office that Mr. Rucker has not been doing any kind of work, actually minimal work because of inability to move his neck. When I have seen Mr. Rucker on the last few visits, his main complaint was that he was unable to get along with his supervisors and he believed that the management was harrassing him and he needs to do more, but they are not letting him do more.

Based on my previous examination with Mr. Rucker, he does have full range of motion with flexion and extension still associated with some discomfort. I felt Mr. Rucker was able to return to his regular work activities. He received therapy for a long period of time. He has been on modified work for about four or five months. His work was modified after a physical therapist, Ms. Cathy Hobbs, did a site visit and recommended some changes. These changes were already done. He was seen in consultation by Dr. Robert Ansell on my recommendation. Dr. Ansell's impression was that Mr. Rucker

EXHIBIT G

U.S. POSTAL SERVICE
RE: Harold Rucker
August 4, 1995

Page two

probably had chronic parascapular musculoskeletal strain secondary to repeated nature of the work. He recommended further treatment and also change in his work capacity which has been modified according to this recommendation.

Because of Mr. Rucker's persistent complaint, I have requested an MRI of the cervical spine and I have considered Mr. Rucker permanent and stationary and probably requires a Qualified Medical Examination, hopefully shortly after we obtain the cervical MRI.

I have not violated Labor Code Section 139.3 and the contents of the report and bill are true and correct to the best of my knowledge. This statement is made under penalty of perjury.

Alameda County, California.

Sincerely,

Mussam El-Gohary, M.D.
Consultant, Physical Medicine and Electrodiagnosis

HEG/dm

September 28, 1995

U S Dept of Labor
Employment Standards Administration
O[illegible] C P
P[illegible] BOX 3769
S[illegible] FRANCISCO CA 94119-3769

RE: RUCKER, HAROLD
DOI: 11/30/94

To whom it may concern:

In Mr. Rucker's statement of September 18, 1995, there were some misleading and false statements attributed to me. One item was that I provided the medical facility with information that caused them to alter their commitment to unbiased medical treatment. That is totally false. He has been going to this facility almost continuously since his employment in 1991. They have all the files needed to render a decision. The decision was that Mr. Rucker was fit for full duty with no limitations. Mr. Rucker refuses to accept the decision. He has returned to the doctor in an attempt to get the no limitations changed on a number of occasions, to no avail. He has continued to attempt to use [illegible]econd opinion that was done by Dr. Robert Ansel. This is [illegible]ot his Doctor of Record.

Mr. Rucker made comment on the speed that he was sorting mail. The minimum standards that a carrier should case letters is eighteen (18) per minute. During the week of August 28 to 31, 1995, Mr. Rucker cased at the rate of 1.76 pieces per minute. As you can see, there was very little effort on his part. This effort has not changed much as of this date.

The management of this office have complied with every limitation in which the doctors have given Mr. Rucker for years now. We have tried to get Mr. Rucker to be a productive employee. Somehow all our efforts have not been successful. We have not treated him any different than any other employee.

[illegible]ncerely,

WILLIAM J AUGUST
POSTMASTER
2201 SHORELINE DRIVE
ALAMEDA CA 94501-9998



EXHIBIT H

Attachment A

The statement given by Harold Rucker "The faster I attempted to sort mail the more tension I feel in my left shoulder.) This is very unclear to me, first of all I don't see how he can feel tension in his left shoulder when he cases mail with his right hand, the only repetitive motion is done with his right arm and shoulder. Mr. Rucker was released to full duty with no limitations or restrictions, on July 5, 1995. Our expectation of him wasn't any higher than it was before he went on limited duty which was November 30, 1994. We did not require Mr. Rucker to case mail until 7-21-95, at that time he claimed he could not perform his duties unless he could sit down and rest when he felt like he needed to. We inform Mr. Rucker that his job assignment did not require sitting and that he had no statement or limitation from his doctor stating this restriction. He then requested to see his doctor so that he could get his limitations change. He returned to work a few hours later with a statement from his doctor saying that Mr. Rucker should return to full duty with no limitation or restrictions. Mr. Rucker still insisted he was unable to perform his duty as the doctor ordered and requested to leave work on sick leave not returning to work until August 28, 1995. Since Mr. Rucker return he has been insisting that he should be allowed to sit down and rest when he feel like it. Each time we denied his request he would leave work on sick leave.

We have tried our best to accommodate Mr. Rucker in his rehabilitation, his limited duty assignments consisted of sitting and reading and sometimes stamping mail. Since his return to full duty after seven months of limited duty Mr. Rucker performance have been well below minimum standard, I feel that Mr. Rucker want to be on limited duty and he is determined to fight us all the way until he get his limitations change. For this reason I feel his claim should be denied.

WARREN SPENCER
SUPERVISOR CUSTOMER SERVICE

***EXHIBIT H** Attachment A*

September 8, 1995

William J. August
Postmaster
United States Post Service
2201 Shoreline Drive
Alameda, CA 94501-9998

Re: Temporary Assignment of Light Duty

Dear Mr. August;

I am in receipt of your letter dated September 5, 1995. I am dismayed at your past and present display of insensitivity, arrogance and the basic failure to use good judgment. Your refusal to allow me to explain the extent of my medical condition to you while you willfully and blatantly disseminate personal medical information in support of your disbelief of my medical condition stresses me greatly.

Although you may not be familiar with my request for "restricted duty" you are nevertheless familiar with the gist of Article 13.2A of the National Agreement. It appears that it is your contention that Dr. El-Gohary's statement is all that you have to rely upon in making your decision. That type of decision is negligent and irresponsible. Please be advised that Dr. El-Gohary is a Physiatrist, **phys□i□at□rist** (fĭz'ē-ăt'rĭst, fī-zī'ə-trĭst) *n.* **1.** A physician who specializes in physical medicine. **2.** A health care professional who administers physical therapy; a physical therapist.

The medical information submitted to you for your consideration of my request for "temporary restricted or light duty" was from Dr. Allan Halden, M.D., a specialist in the field of orthopedic surgery. In support of Dr. Halden's findings please find accompanying this letter a medical report from Dr. Robert D. Ansel who is a specialist in the field of neurology, **neu□rol□o□gy** (nŏŏ-rŏl'ə-jē, nyŏŏ-) *n. Abbr.* **neur., neurol.** The medical science that deals with the nervous system and disorders affecting it.

As a matter of suggestion, I have a strong background in computers and I can type in excess of 60 wpm. I also anticipate that I will be transferring to the Oakland Facility as an Electronic Technician in the very near future, therefore, as a mater of assistance, I can assist Jim Curran improve his skills and proficiency in his computer related job activities and familiarize myself with the Post Office's computer system as well.

In the alternative, if it presents a problem for you to comply with the suggestions of the physicians by assigning me to a job with less repetitive arm movements, it is my request

EXHIBIT I

that you so advise your staff of supervisors of the problem and have them conduct themselves accordingly.

I would like to make it clear to you that I wish to remain productive and active. I do not want another episode of me sitting and reading. I would like to continue performing my collections because it affords me an opportunity to get some meaningful physical movement.

I must remind you that the medical information submitted to you is confidential and not to be construed as permission to disseminate any information pertaining to my medical condition to anyone.

I request that you respond to my request as soon as possible.

Very Truly Yours,

Harold J. Rocket

Enclosures

Narrative of Dr. Robert D. Ansel

U. S. Postal Service ROUTING SLIP	Dept., Office or Room No.	
To: 1 HaveLD Rucker		☐ Approval ☐ Signature ☐ Comment ☐ See Me ☑ As Requested ☐ Information ☐ Read and Return ☐ Run and File ☐ Necessary Action ☐ Investigate ☐ Recommendation ☐ Prepare Reply ☐
2		
3		
4		
5 MEDICAL UNIT		
From: USPS OAKLAND DIVISION 1675 7th ST RM 232 OAKLAND CA 94615-9442		Extension 874-5546
Date 9-15-25		Room No.

Remarks:

PER YOUR TELEPHONE REQUEST:

THIS STATEMENT ACKNOWLEDGES that Mr. Rucker ON or around July 26TH called myself to confirm a FFD appt by Dr. Wilson to be held in the MEDICAL UNIT. Dr. Wilson denies scheduling such appt and stated that I'M August mis-understood that we were NOT scheduling A FFD pending OWCP 2nd opinion EXAM. I NOTIFIED Mr. Rucker that he had NO such scheduled appt and we will await final outcome of OWCP claim

LINDA ARMITAGE
OHNA

ITEM 0-13, Aug. 1976 (Additional Remarks on Reverse) GPO : 1993 O - 349-591

Exhibit 2

EXHIBIT J

and Claim for Compensation

...mployment Standards ... Office of Workers' Com... ...sation Programs

13 10 95

FN #05-0072

Employee: Please complete all boxes 1 - 18 below. Do not complete shaded areas.
Employing Agency (Supervisor or Compensation Specialist): Complete shaded boxes a, b, and c.

Employee Data

1. Name of employee (Last, First, Middle): Rucker Harold Jerome
2. Social Security Number: 302-46-5770
3. Date of birth: Mo. 11 Day 06 Yr. 48
4. Sex: Male
5. Home telephone: (510) 632-7727
6. Grade as of date of last exposure: Level 5 Step 9
7. Employee's home mailing address (include city, state, and zip code): 419 Darwin Avenue, Oakland, CA. 94603-2121
8. Dependents: ☐ Wife, Husband ☐ Children under 18 years ☐ Other

Claim Information

9. Employee's occupation: Postal Clerk/Carrier/Router/Collector
10. Location (address) where you worked when disease or illness occurred (include city, state, and zip code): 2201 Shoreline Drive, Alameda CA 94501
11. Date you first became aware of disease or illness: Mo. 11 Day 30 Yr. 94
12. Date you first realized the disease or illness was caused or aggravated by your employment: Mo. 11 Day 30 Yr. 94
13. Explain the relationship to your employment, and why you came to this realization: REPETITIVE MOVEMENT of the arms in conjunction w/ position of neck and head appears to initiate tension in back of shoulder and neck which radiates across the shoulders up the back of the neck. If I continue the activity, a tension headache will ensue. If I continue to perform the activities that initiate the tension periodically, stop allow tension to subside, upon subsequent resumption of the subject activity the tension radiates down the shoulders to the lower back. Sitting sometimes help to relieve the tension. Standing appears to exacerbate the situation or condition.
14. Nature of disease or illness: Chronic muscle tension
15. If this notice and claim was not filed with the employing agency within 30 days after date shown above in item #12, explain the reason for the de... NOTICE AND CLAIM OF THIS INJURY WAS SUBMITTED TO THE APPROPRIATE AGENCY, HOWEVER IT WAS NOT UNTIL RECENTLY THAT THE INJURY WAS CLASSIFIED AS A OCCUPATIONAL DISEASE CAUSED OR AGGRAVATED BY STRESSFUL CONDITIONS ON THE JOB ALSO DELAYED THE SUBMISSION OF
16. If the state... requested in item 1 of the attached instructions is not submitted with this form, explain reason for delay. DOCUMENTS: See attached statement
17. If the medical reports requested in item 2 of attached instructions are not submitted with this form, explain reason for delay: See attached reports (2 medical reports)

OCT 2 1995

Employee Signature

18. I certify, under penalty of law, that the disease or illness described above was the result of my employment with the United States Government, and that it was not caused by my willful misconduct, intent to injure myself or another person, nor by my intoxication. I hereby claim medical treatment, if needed, and other benefits provided by the Federal Employees' Compensation Act.

Signature of employee or person acting on his/her behalf: Harold J. Rucker Date 9/8/95

Have your supervisor complete the receipt attached to this form and return it to you for your records.

EXHIBIT K

Any person who knowingly makes any false statement, misrepresentation, concealment of fact, or any other act of fraud to obtain ... which that person is not entitled, is subject to felony

...l Supervisor's Report of Occupational Disease: Please complete information requested below

...ency name, and address of reporting office (Include city, state, and zip code) — OWCP Agency Code

~~EMERYVILLE POST OFFICE~~ Injury Comp. 543200

USPS OAKLAND DISTRICT
1675 7TH ST RM 426-1
OAKLAND CA 94615-9446

~~94501-9998~~

OSHA Site Code 94501

...mployee's duty station (Street address and zip code) — Zip Code

EMERYVILLE MAIN P.O. 2201 SHORELINE DR. 94501

...gular ...rk ...urs — From: 10:30 ☐ a.m. ☐ p.m. To: 7:00 ☐ a.m. ☒ p.m.

22. Regular work schedule ☐ Sun. ☒ Mon. ☒ Tues. ☒ Wed. ☒ Thurs. ☒ Fri. ☐ Sat.

...ame and address of physician first providing medical care (Include city, state, zip code)

READICARE
7817 OAKPORT ST
OAKLAND CAL.

24. First date medical care received — Mo. 11 Day 30 Yr. 94

25. Do medical reports show employee is disabled for work? ☐ Yes ☒ No

...ate employee ...rst reported ...ondition to ...upervisor — Mo. 9 Day 20 Yr. 95

27. Date and hour employee stopped work — Mo. Day Yr. Time : ☐ a.m. ☐ p.m.

...ate and ...hour employee's ...pay stopped — Mo. Day Yr. Time : ☐ a.m. ☐ p.m.

29. Date employee was last exposed to conditions alleged to have caused disease or illness — Mo. Day Yr.

...ate ...returned ...o work — Mo. Day Yr. Time : ☐ a.m. ☐ p.m.

If employee has returned to work and work assignment has changed, describe new duties

NO

30 783 hrs
1,997 hrs

...Was injury caused by third party? ☐ Yes ☒ No If "No," go to item 34.

33. Name and address of third party (Include city, state, and zip code)

...A supervisor who knowingly certifies to any false statement, misrepresentation, concealment of fact, etc., in respect to this claim may also be subject to appropriate felony criminal prosecution.

I certify that the information given above and that furnished by the employee on the reverse of this form is true to the best of my knowledge with the following exceptions:

SEE ATTACHMENT

WARREN SPENCER
...me of Supervisor (Type or print)

...nature of Supervisor

SUPV. CUST. SERV.
...pervisor's Title

Date 9-21-95

Office phone

September 29, 1995

Attn.: Todd Bruininks
U.S. Department of Labor
Office Of Worker's Compensation Programs
P.O. Box 3769
San Francisco, CA 94119

Injury Date: 11-30-94
File No. 94603-13-~~[illegible]~~ 1092154

Dear Mr. Bruininks;

I have attempted to contact you on several occasions the latest effort being this day during the morning and afternoon. The situation in which I had described to you in July is now beginning to developed into a situation that is placing my employment in jeopardy.

I am requesting a change in medical provider due to the fact that the current medical provider Readicare, (Post Office's contracted medical provider) that appears to be under the direct influence of the Postmaster of Alameda Post Office. My work status has not been changed to reflect any corrective treatment for this injury. I am constantly being monitored for work performance by supervisors when in fact they know that I have had this injury since November 30, 1994 and it has not improved.

Although I have complained that the pain has become more intense, nothing has been done to address the matter. It appears medical treatment is being denied to me due to Readicare's commitment to the Post Office. The treating physician indicates to me that he can not administer treatment, prescribe any physical therapy or change my work status to accommodate my condition. In the interim, I must curtail the repetitive moments associated with sorting of mail to cope with the regularly reoccurring pain.

It is interesting that the Postmaster of Alameda Post Office has taken this opportunity to give me an poor production evaluation, and assign me to re-training due to my inability to perform sorting of mail which involves the repetitive moments that initiates the pain..

I have contacted my Union and I have filed an EEO Complaint. However it is imperative that I seek medical treatment from my medical provider to avoid what appears to be a contrived scheme to deny me medical treatment.

EXHIBIT L

13-1098057

October _, 1995

Attn.: Todd Bruininks
U.S. Department of Labor
Office Of Worker's Compensation Programs
P.O. Box 3769
San Francisco, CA 94119

Injury Date: 11-30-94
File No. 94603-13-1064238

Subject: Change of Medical Provider

Dear Mr. Bruininks;

Thank you for your return call. Pursuant to our conversation I may change my medical provider upon informing you in writing whom I have chosen as my current medical provider. In compliance with your request this is a letter formally requesting a change of medical provider from Readicare, the Post Office's contracted medical provider to that of my own medical provider, Kaiser Foundation.

I apologize for the confusing as to the proper medical forms to submit to OWCP. It would help greatly if the Post Office's managerial staff knew what was going on and provided accurate information instead of having the employee to determine what forms he needs from his limited knowledge of administrative forms.

Thank you again for your attention to this matter.

Sincerely,

Harold J. Rucker

EXHIBIT M

Within 5 days of your initial examination, for every [illegible] personal injury or illness, [illegible] two copies of this report to [illegible] employer's workers' compensation insurance carrier [illegible] self-insured employer. Failure to file a timely [illegible]'s report may result in a [illegible] ment of a civil penalty. In case of diagnosed or suspected pesticide poisoning, send a copy of this report to Division of Labor Statistics and Research, P.O. Box [illegible], San Francisco, CA 94142-0603, and notify your local health officer by telephone within 24 hours.

1.INSURER NAME AND ADDRESS US POSTAL SERVICE	1675 7TH ST., ROOM 426-1	OAKLAND		CA 94615-	PLEASE DO NOT USE THIS COLUMN
2.EMPLOYER NAME US POSTAL SERVICE	13 ~~1064298~~				Case No.
3.Address No. and Street 1675 7TH ST., RM 421	City OAKLAND	Zip 94615-	1092154		Industry
4.Nature of Business (e.g., food manufacturing, building construction, retailer of women's clothes)					County
5.PATIENT NAME (First name, middle initial, last name) PUCKER HAROLD	6. Sex ☒ Male ☐ Female	7. Date of Birth Mo. Day Year 11/06/48			Age
8.Address No. and Street 419 Darien Avenue	City Oakland	Zip 94603-	9. Telephone number (510) 632-7727		Hazard
10.Occupation (Specific job title) Clerk/Router/Carrier			11. Social Security Number 382-46-5778		Disease
12.Injured at: No. and Street Jobsite	City Oakland	County Alameda			Hospitalization
13.Date and hour of injury or onset of illness Mo. Day Yr. 11/30/94	Hour a.m. p.m.		14. Date last worked Mo. Day Yr. 10/04/95		Occupation
15.Date and hour of first examination or treatment Mo. Day Yr. 10/04/95	Hour a.m. p.m.		16. Have you (or your office) previously treated patient? ☐ Yes ☐ No		Return Date/Case

Patient: please complete this portion, if able to do so. Otherwise, doctor please complete immediately. Inability or failure of a patient to complete this portion shall not affect his/her rights to worker's compensation under the California Labor Code.

17. DESCRIBE HOW THE ACCIDENT OR EXPOSURE HAPPENED (Give specific object, machinery or chemical. Use reverse side if more space is required.)

Repetitive arm movement causes muscle tension in the (L) back shoulder area, migrating to the right shoulder then up to the (L) side of the neck.

18.SUBJECTIVE CLAIMS (Describe fully. Use reverse side if more space is required.) Burning section of (L) upper shoulder, pain in neck and persistence muscle tension.

19. OBJECTIVE FINDINGS (Use reverse side if more space is required.)

A. Physical examination Examination of LUE and RUE is normal at this time. Palpation of (L) scapula area and Trapezoid are tender.

B. X-ray and laboratory results (State if none or pending.)

20. DIAGNOSIS (If occupational illness, specify etiologic agent and duration of exposure.) Chemical or toxic compounds involved? ☐ Yes ☐ No

726.10 ROTATOR CUFF SYNDROME

ICD-9 Code 726.10

21. Are your findings and diagnosis consistent with patient's account of injury or onset of illness? ☐ Yes ☐ No

If "no", please explain.

22. Is there any other current condition that will impede or delay patient's recovery? ☐ Yes ☒ No

If "yes", please explain.

23. TREATMENT RECOMMENDED (Use reverse side if more space is required.)

Naprosyn 500mg

If further treatment required, specify treatment. Estimated duration

24. If hospitalized as inpatient, give hospital name and location. Date admitted Mo. Day Yr. Estimated stay

25. WORK STATUS Is patient able to perform usual work? ☐ Yes ☒ No

If "no", patient can return to: Mo. Day Yr.

Regular work ~~10/04/95~~

Modified work Specify restrictions

Doctor's Signature ~~Wesley Watkins, M.D.~~ Date: 10/04/95

Doctor name and degree (Please Type) ~~Wesley Watkins, M.D.~~

Case # ~~10-30-12-51~~

CA License Number C36458

IRS Number ~~94-3144585~~

Telephone Number ~~(510) 987-8611~~

EXHIBIT N

1200 Clay Street, Suite 510
Oakland, CA 94612
(510) 987-5611
FAX (510) 987-5615

WORK STATUS REPORT

Name: Harold Rucker Date: 10.4.95 Time In: 8:00 Time Out: 9:00

Employer: USP Contact Person:

Date of Injury/Illness: 11.30.94 Date First Seen: 10.4.95

Diagnosis: Left Upper Ext. Overuse Synd. ☒ Industrial ☐ Non Industrial

WORK RESTRICTIONS

☐ Unable to return to work: ☐ Today ☐ From: _____ through _____

☐ Can return to full duties WITH no restrictions on: _____

☑ Can participate in modified work from: 10-4-95 through 10-10-95

☐ Estimated date patient can return to full duty: ____/____/____

Work restrictions: _____ Hours per day _____ per week

LIFT/CARRY:

0-10 lbs ☐ Yes ☐ No _____ hours/day

11-25 lbs ☐ Yes ☐ No _____ hours/day

25-40 lbs ☐ Yes ☐ No _____ hours/day

Over 40 lbs ☐ Yes ☐ No _____ hours/day

ABLE TO DO:

Activity	BENDING	SQUATTING	CLIMBING	KNEELING	STANDING	WALKING	SITTING
Continuous	Yes	Yes	Yes	Yes	No	Yes	Yes
Intermittent	"	"	"	"	No	"	"
Hrs/Day	"	"	"	"	No	"	"

☐ NO repetitive lifting above shoulder level. ☐ NO repetitive lifting from floor to the shoulder level.

☐ Repetitive use of hands & fingers NO more than _____ minutes out of every hour. ☑ Avoid prolong & repetitive use of pinch grip

☐ Work on tasks that require reaching and/or working above the shoulder level. ☐ Yes ☐ No Frequency: _____

☑ Work on tasks that require pushing/pulling: ☐ Right Hand ___Yes ___No ☑ Left Hand ___Yes ___No Frequency: _____

OTHER RESTRICTIONS:

☐ Keep wound/dressing clean & dry. ☐ Use assistive devices: Sling, Brace, Crutches, Protective Glasses

☐ Avoid exposure to chemicals, fumes, dust or gas. ☐ Avoid working near hazardous equipment & machinery or work at height

☑ Other: Must have 15 min. breaks from mod activities

If modified work is not available employee is then off work for the same time period.

Treatment: Naprosyn 500 mg #20 T bid x 1 mo

FOLLOW UP CARE:

☑ Re-evaluation on: 10-10-95 Time: 4:00

☐ Physical Therapy prescribed: Frequency _____ Duration _____

☐ Consultation requested from Dr. _____ Specialty _____

☐ Special tests/procedures required: _____

☐ Final visit, Patient discharged as cured on: _____ Patient's condition is permanent and stationary with NO residuals

Signature, M.D. Wesley J. Watkins 5th M.D.

Name of Treating Physician

October 19, 1995

Alameda Post Office
Attn: William August,Postmaster
2201 Shoreline Drive
Alameda, CA 94501

Re: Refusal To Honor My Doctor's Restriction

Dear Postmaster,

As of October 5, 1995, I have been told by numerous Supervisors that my Doctor's orders as to the restrictions imposed by him will not be honored. I had contested the order of the supervisors because it is contrary to sound medical advice and it does not assist in the healing process from this medical condition. I have forced myself to comply as much as possible with the orders, however my compliance has appeared to made my condition worse.

I have asked on numerous occasions to have this matter resolved as expeditiously as possible. I have been told by supervisors at this facility that there is nothing that can be done. I get the impression that no one want to do anything. I have supplied sufficient information for action to be taken to address this matter in a civilized fashion. Forcing me to do those things that is contrary to my Doctor's advice and in complete disregard for my medical condition is not civilize nor intelligent.

I have attempted to address this matter in an amicable fashion. It is my belief that you have caused this medical condition to become increasingly debilitating. The delay in the proper medical treatment by the antics conducted in July, 1995, the interference in the Doctor's treatment, the overt refusal to honor my Doctor's restrictions, the arrogant posture of asserting that Readicare is my medical provider when I have informed you that Readicare is no longer my medical provider of choice and the unsubstantiated refusal to acknowledge my medical condition has lead me to believe that your actions are intentionally designed to cause me additional distress and done with forethought and malice.

If my doctor's restrictions are not honored, I would like the reasons for such in writing. I would also like to know what Postal Regulation gives managerial personnel the right to ignore or supersede the orders of a medical Doctor.

Your immediate attention to this matter is requested.

Very Truly Yours,

Harold J. Rucker

EXHIBIT O

UNITED STATES POSTAL SERVICE

EQUAL EMPLOYMENT OPPORTUNITY CASE

IN THE MATTER OF:

Harold Rucker 419 Darien Avenue Oakland, CA 94603-2121 Complainant, v. William J. Henderson, Postmaster General, Respondent.	EEO Case No.: 4F-945-1004-96 EEOC Case No.: 370-97-X2563 Filed On: November 14, 1995 CERTIFIED MAIL #Z 286 722 062 RETURN RECEIPT REQUESTED

FINAL AGENCY DECISION

This is the Postal Service's Final Agency Decision on the above-referenced discrimination complaint. The complainant alleged discrimination based on race (Black), sex (male), physical disability (cervical/neck/back strain), mental disability (stress), and retaliation (prior EEO activity), when: (A) on September 12, 1995, he became aware that he was charged with AWOL; (B) on August 28, 1995, he was given a direct order to case mail in violation of his medical condition; and (C) on September 5, 1995, he was denied temporary limited duty.

The case was processed pursuant to applicable Equal Employment Opportunity Commission (EEOC) regulations in 29 CFR §1614, and upon receipt of the investigative file, the complainant requested a hearing before an EEOC Administrative Judge. The case was forwarded to the District Director, EEOC, San Francisco, California. On February 2, 1999, Administrative Judge Terrie B. Brodie issued a recommended decision finding no discrimination.

The transmittal letter was dated February 2, 1999, and received at the EEO Compliance and Appeals Section, Pacific/Western Areas, South San Francisco, California, on February 3, 1999.

EXHIBIT P

DISCRIMINATION ISSUES

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set forth the basic allocation of the burden and order of proof in a Title VII case. See also, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under the McDonnell-Douglas and Burdine constructions, a three-step process is involved in a disparate treatment case, the first step of which is for the complainant to establish a *prima facie* case of discrimination. See McDonnell-Douglas, *supra*, at 802. This *prima facie* case rests on the assumption that fulfilling its requirements establishes facts from which an inference can be drawn that if the employer's actions remain unexplained, it is more likely than not that such actions were based on a discriminatory criteria illegal under the Act. Furnco Construction Co. v. Waters, 438 U.S. 567 (1978).

If the complainant has been successful in establishing a *prima facie* case, the employer must then articulate a legitimate, non-discriminatory reason for the employment decision. The employer need only demonstrate that a genuine issue of fact is raised by the evidence as to its action in order to meet its burden of going forward with the evidence. See Furnco, *supra*; Board of Trustees of Keene State College v. Sweeney, 439 U.S. 28 (1978).

Having done so, the burden shifts back to the complainant to prove by a preponderance of the evidence that the employer's reason was a pretext for intentional discrimination. McDonnell-Douglas, *supra*, at 802-804; Burdine, *supra*, at 252-253; United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). To meet that burden, a complainant must show that the employer did not rely on its proffered reason or that the proffered reason is not worthy of belief. In sum, proof of discriminatory motive is critical in a disparate treatment case, International Brotherhood of Teamsters v. U.S., 431 U.S. 324, at 325 (1977), and the burden of proof remains at all times with the complainant. Burdine, *supra*, and Aikens, *supra*.

Despite these shifting burdens of production, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the Complainant remains at all times with the Complainant. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 113 S.Ct. 2742 (1993)

RETALIATION

Section 717 of Title VII of the Civil Rights Act of 1964 as amended, 42 USC §2000e-*et seq.*, and the EEOC's Federal Employment Discrimination Regulations at 29 CFR §1614.101(b) forbid retaliation against an individual for participating in

a Title VII employment discrimination process. White v. GSA, 652 F.2d 913, 917 (9th Cir. 1981). The principles developed in Title VII discrimination cases alleging disparate treatment as set forth above are applicable to actions for unlawful retaliation. Cohen v. Fred Meyer, Inc., 686 F.2d 973, 976 (9th Cir. 1982). To establish a *prima facie* case of retaliation, complainants must show:

(1) they engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding;

(2) they received adverse treatment from the employer contemporaneously with or subsequent to such opposition or participation; and

(3) there was a causal connection between the protected activity and the adverse treatment.

Jackson v. RKO Bottlers of Toledo, Inc., 35 EPD Paragraph 34, 622 (6th Cir. 1984); Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339 (10th Cir. 1982), *cert. den.* 459 U.S. 1071 (1982); Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1354 (9th Cir. 1984).

Causation may be inferred from the proximity in time between the protected activity and the adverse employment action. Also, complainants can prove causation by providing other forms of circumstantial evidence, or direct evidence of retaliatory motivation. Miller v. Fairchild Industries, Inc., 797 F.2d 727 (9th Cir. 1986).

DISABILITY

Employment discrimination against a physically or mentally handicapped federal employee is prohibited under Sections 501 and 504 of the Rehabilitation Act of 1973, 29 USC §§791, 794 as amended by the Rehabilitation Act Amendments of 1992 and the EEOC's regulations at 29 CFR §1614.203 *et seq.* The provisions of the Rehabilitation Act are patterned after Title VII, see Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1081 (5th Cir. 1980), and federal employees have the same procedural rights and remedies as those proceeding under Title VII.

In order to establish a *prima facie* case of handicap discrimination, the complainant must show that:

(1) s/he is a "qualified handicapped individual" (or perceived as handicapped by the employer); and

(2) s/he was treated differently and less favorably than individuals not of his/her protected class; or

(3) the agency failed to make a needed reasonable accommodation, resulting in adverse treatment of the complainant.

See Smith v. Administrator of Veterans Affairs, 33 EPD Paragraph 34, 259 (C.D. Cal. 1983).

Under Section 706(6) of the Rehabilitation Act (29 USC §706(6) (supp. V. 1975) and 29 CFR §1614.203(a)(i), a handicapped individual is defined as any person who:

(1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(2) has a record of such impairment, or

(3) is regarded as having such an impairment.

If complainant establishes that s/he is a "perceived" handicap, s/he has proved his/her *prima facie* case, and the burden shifts to the employer. Where the employer's perception is not at issue, the employee must establish three factors to prove s/he is handicapped within the meaning of the Act:

(1) s/he has a mental or physical impairment;

(2) such impairment substantially limits a major life activity; and

(3) s/he is a "qualified handicapped person."

DISCUSSION

The Administrative Judge concluded in her analysis and findings the complainant failed to raise a genuine issue of fact that he had a physical or mental disability within the meaning of the rehabilitation act. Relative to issue A (AWOL), the judge found no evidence of discrimination or retaliation. The complainant simply did not provide information as requested to support his two-week absence. Accordingly, the judge found the agency did not fail to provide reasonable accommodation when complaint was marked AWOL. Issue B--complainant given a direct order to case mail--Judge Brodie found no evidence that the agency failed to reasonably accommodate complainant when he was told to case

mail. Complainant's doctor had released him to work without restrictions. Complainant was advised of the procedures for changing his doctor's medical report and how to change treating physicians. Issue C--denied limited duty request--was also found to be without merit. The agency relied on complainant's treating physician's findings. Complainant was released to work full duty, and did not change his treating physician as he was advised by the agency. The judge analyzed all items in the light most favorable to complainant and found that complainant was not the victim of discrimination or retaliation. He recommended a finding of no discrimination on any basis.

CONCLUSION

After a review of the entire record, the Postal Service adopts the Administrative Judge's Findings of Fact and Conclusions of Law. Therefore, EEO Case No. 4F-945-1004-96 is hereby closed. By copy of the Administrative Judge's February 2, 1999 letter, a copy of the Findings of Fact and Conclusions of Law was transmitted to the complainant.

APPEAL RIGHTS:

RIGHT TO FILE A CIVIL ACTION

If you are dissatisfied with the Postal Service's final decision in this case, you may file a civil action in an appropriate U.S. District Court, within 90 calendar days of your receipt of the Postal Service's final agency decision. If you choose to file a civil action, that action should be captioned Harold Rucker v. William J. Henderson, Postmaster General. You may also request the court to appoint an attorney for you and to authorize the commencement of that action without the payment of fees, costs, or security in such circumstances as the court deems just. Your application must be filed within the same 90-day time limit for filing the civil action.

APPEAL TO THE EEOC

Alternatively, you may file an appeal with the Office of Federal Operations (OFO), Equal Employment Opportunity Commission (EEOC), P.O. Box 19848, Washington, D.C. 20036-9848, within 30 calendar days of your receipt of this decision. Enclosed is a copy of EEOC Form 573, Notice of Appeal/Petition To The Equal Employment Opportunity Commission, Office of Federal Operations, should you wish to appeal this matter. Any supporting

statement or brief must be submitted to the EEOC within 30 calendar days of filing the appeal. Along with your appeal, you must submit proof to the EEOC that a copy of the appeal and any supporting documentation were submitted to the EEO Compliance and Appeals Coordinator, Pacific/Western Areas, U.S. Postal Service, P.O. Box 4402, South San Francisco, CA 94099-4402. Failure to file within the 30-day time period could result in the EEOC's dismissal of the appeal unless you explain, in writing, the extenuating circumstances which prevented you from filing within the prescribed time limit. In this event, extension of the time limit and acceptance of the appeal will be discretionary with the EEOC.

MAR 2 9 1999

Date

Brian J. Gillespie
Manager, Human Resources
Pacific Area

Enclosure (EEOC Form 573)

cc: Terrie B. Brodie (w/o enclosure)
Administrative Judge
U.S. EEOC, San Francisco District Office
901 Market Street
San Francisco, CA 94103

Patient:

- [X] Was seen at the office on: 9/17/02
- [ ] Has been given telephone advice on: _____
- [ ] Has been ill and unable to work from _____ through _____
- [ ] States he/she has been ill and unable to work from _____ through _____
- [X] Diagnosis Adjustment Disorder with Depressed Mood 309.00
- [X] Can return to full duties with NO RESTRICTIONS ON 9/18/02
- [ ] Can participate in a modified work program starting _____ and continuing to _____

(Please note: If modified work is not available, this patient is then unable to work for this time period.)

- [ ] RESTRICTIONS: _____ Hours per day _____ Hours per week

BASED ON AN 8-HOUR DAY EMPLOYEE CAN:

Stand/walk	____ hours at a time	____ total hours	[ ] no restrictions
Sit	____ hours at a time	____ total hours	[ ] no restrictions
Drive	____ hours at a time	____ total hours	[ ] no restrictions

LIFT/CARRY: (Occasional = up to 1/3 rd/day, Frequent = up to 2/3 rd/day)

0-10 lbs	[ ] occasionally	[ ] frequently	[ ] frequently	[ ] no restrictions
11-25 lbs	[ ] occasionally	[ ] frequently	[ ] frequently	[ ] no restrictions
26-40 lbs	[ ] occasionally	[ ] frequently	[ ] frequently	[ ] no restrictions

EMPLOYEE IS ABLE TO:

Bend	____ hrs/8 hr	[ ] occasionally	[ ] frequently	[ ] no restrictions
Crawl	____ hrs/8 hr	[ ] occasionally	[ ] frequently	[ ] no restrictions
Kneel	____ hrs/8 hr	[ ] occasionally	[ ] frequently	[ ] no restrictions
Climb	____ hrs/8 hr	[ ] occasionally	[ ] frequently	[ ] no restrictions
Work above shoulder	____ hrs/8 hr	[ ] occasionally	[ ] frequently	[ ] no restrictions
Perform repetitive hand motions	____ hrs/8 hr	[ ] occasionally	[ ] frequently	[ ] no restrictions

ASSISTIVE DEVICES? (i.e., cast, brace, crutches) _____

RESTRICTIONS: (Interpersonal relations, stress, hearing or vision) _____

OTHER: _____

TREATMENT STATUS: _____

- [ ] Medication effects which could impair performance _____
- [ ] Physical therapy required Frequency _____
- [ ] Re-evaluation on: _____

SIGNATURE AND TITLE	NAME (PRINT)	LOCATION	DATE
[signature] M.D.	Ronald J Mechling	Cleveland	9/17/02

12536 (REV. 9-90)

VISIT VERIFICATION

FAX TRANSMISSION
SEP 17 2002 11:48
FROM: MECHLING RONALD J
2ET098L 9

EXHIBIT "Q"

UNITED STATES POST OFFICE

DATE: September 25, 1995

OUR REF: SOS:WSPENCER:np:94501-9998

SUBJECT: Restricted Sick Leave

TO:
HAROLD RUCKER
CITY CARRIER
2201 SHORELINE DRIVE
ALAMEDA CA 94501-9998

Due to repeated unscheduled absences, you are advised that until further notice, you will be required to present a doctor's certificate or other acceptable evidence, on the day you return to duty, in support of every absence for sickness. Failure to do so will result in charging the absence to Absence Without Official Leave (AWOL).

Your sick leave record will be revieved quarterly; and if substantial improvement has been shown, you will be notified in writing that your name has been removed from the restricted sick leave list.

You may, if you wish, submit a written reply to this letter, addressed to me no later than five (5) calendar days after the receipt of this letter.

WARREN SPENCER
SUPV CUSTOMER SERVICE
U S POSTAL SERVICE
2201 SHORELINE DRIVE
ALAMEDA CA 94501-9998

EXHIBIT "R"

PERSONNEL SERVICES
OAKLAND DISTRICT

UNITED STATES POSTAL SERVICE

May 17, 1995

MAY 1995
UNITED STATES POSTAL SERVICE
OAKLAND, CALIFORNIA

POSTMASTER
US POSTAL SERVICE
2201 SHORELINE DR
ALAMEDA CA 94501-9998

SUBJECT: EVALUATION/INFORMATION REQUEST
RE: RUCKER, HAROLD J. 302-46-5770

The above-referenced individual has reached on a EAS as EAS in [redacted] this office. Prior to any further consideration, we will require the following information: an absence analysis (PS Form 3972) covering at least 24 months, the Adverse Action File, where applicable, and the Official Personnel Folder of the employee. It is requested that this information be forwarded to this office within ten (10) days.

1. Title and length of time in current position: CITY CARRIER - SOUTEK Since 8/07/93

2. Date of initial appointment: 6/01/91

3. Safety:

   a. Has this employee ever had an industrial accident? yes
   If yes, date and type, as defined by item 50 of PS Form 1769 (list all) please see attached sheet

   b. Has this employee ever had a vehicular accident (on duty)? yes
   If yes, date and type (list all) please see attached sheet

4. Attendance:

   a. Has this employee been tardy? YES If yes, how frequently during the last twelve (12) months. 20

EXHIBIT "S"

Evaluation/Information Request
Re: RUCKER, HAROLD J. 302-46-5770
Page Two

b. What is the employee's current sick leave balance? 26 Hrs.-PP10/S
Please explain any extenuating circumstances, if appropriate.

5. Work Performance:

a. Has this employee received a superior performance award or quality step increase? NO If yes, when (list all)

6. Conduct:

a. Has this employee required corrective action as defined by Article XVI of the National Agreement (please exclude discussions) NO If yes, what type (letter of warning, suspension, etc.) when and for what reason (list all)

Please include in the following spaces a narrative addressing any or all of the following factors in measurable terms, providing examples such as (a) distributes three trays per hour, etc., that would aid us in evaluating this individual for reassignment consideration:

a. Amount of work:
EMPLOYEE IS NOW ON LIMITED DUTY working when she APPROXIMATELY ONE HAMPER A DAY

b. Accuracy:
GOOD

c. Reliability:
GOOD

d. Neatness:
EMPLOYEE IS VERY NEAT

e. Thoroughness:
Employee is very Thorough

f. Application to duty:
GOOD

g. Promptness:
GOOD

h. Conduct:
GOOD

i. Ability to get along with others:
EMPLOYEE GET VERY WELL WITH OTHERS

j. Cooperativeness:
GOOD

Evaluation/Information Request
Re: RUCKER, HAROLD J. 302-46-5770
Page Three

Would you or your office object to the employee's reassignment, if approved?

NO

Immediate Supervisor's Signature

5-25-95
Date

Thank you for your cooperation. Again, we must have the above requested information before we can take any further action to reassign the above employee and select an individual who will best promote the efficiency of the Service.

RIZZA HAMBRIC
SR PERSONNEL SERVICES SPECIALIST
USPS OAKLAND DISTRICT
1675 7TH ST RM 431
OAKLAND CA 94615-9422

cdm

DATE: 06/17/95

EMPLOYEE EVALUATION

RE: RICKER, HAROLD

Please complete the evaluation below on the above named employee this office.

1. LEAVE RECORD: Annual Leave Balance _____
Sick Leave Balance _____

How much S/L has been used during the past 12 months? 65 Hrs.
How much LWOP has been used during the past 12 months? NONE

2. ACCIDENT RECORD: Yes X No ____. If affirmative, attach copi of Federal Employee's Notice of Injury (CA-1) and any oth related documents.

3. QUALITY OF WORK, INCLUDING: (1) ACCURACY; (2) RELIABILI: (3) THOROUGHNESS:

MR RICKER IS VERY ACCURATE AND THOROUGH

4. QUANTITY OF WORK, INVOLVING AMOUNT OF WORK:

CURRENT WORK ASSIGNMENT MR RICKER WORK ABOUT ONE TO ONE AND A HALF NUMBER OF URBAN DAI

5. MANNER OF PERFORMANCE, INCLUDING (1) ATTITUDE TOWARD HIS/HER WO (2) ATTENDANCE & PUNCTUALITY; (3) CONDUCT AND HABITS; (4) NEATNE (5) ABILITY TO GET ALONG WITH CO-WORKERS; 6) COOPERATION W SUPERVISORS; (7) CONTACT WITH THE PUBLIC.

(ATTITUDE TOWARD WORK (GOOD) ATTENDANCE PUNCTUALITY (FAIR) CONDUCT AND HABITS (GOOD) NEATNESS (VERY GOOD) ABILITY TO G ALONG WITH COWORKERS (VERY GOOD) COOP. WITH SUPERVISORS (GO CONTACT WITH PUBLIC (VERY GOOD)

EVALUATION COMPLETED BY: [signature]

DATE: 7-5-95

INCLUDE A COPY OF THE EMPLOYEE's 3972 COVERING AT LEAST 24 MONT Please return to Personnel Services, Room 431. Thank you.

WW ANDREW GARCIA
HUMAN RESOURCES SPECIALIST
USPS HAWAII AND PACIFIC

UNITED STATES POST OFFICE

DATE: SEPTEMBER 25, 1995

OUR REF: SCS:WSPENCER:94501-9998

SUBJECT: LETTER OF WARNING - UNSAFE ACT

TO: HAROLD J RUCKER SS# 302-46-5770
FULL-TIME CITY CARRIER
2201 SHORELINE DR
ALAMEDA CA 94501-9998

This official disciplinary Letter of Warning is being issued to you for the following reason:

Charge Number 1: Unsafe Act

Investigation of your recent accident revealed that at 5:20 p.m. on September 13, 1995, while you were performing your official duties as a collector you committed an unsafe act. You struck the top of your head with the cargo door.

The cargo door was checked and found to be in good working order. The carrier assigned to this vehicle have not reported any problem or hazardous condition when the door is in fully open position. You stated, "struck the top of my head with cargo door as I was pulling myself inside to unload the vehicle." This is an unsafe act.

You will receive remedial training in the near future for the above accident.

It is hoped that this official letter of warning will serve to impress upon you the seriousness of your actions and that future discipline will not be necessary. If you are having difficulties which I may not be aware of or if you need additional assistance or instructions for improving your performance, please call on me, or you may consult with other supervisors, and we will assist you where possible. However, I must warn you that future deficiencies will result in more severe disciplinary action being taken against you. Such action may include suspensions, or removal from the Postal Service.

EXHIBIT "T"

HAROLD RUCKER SS# 302-46-5770
FULL-TIME CITY CARRIER
SUBJECT: LETTER OF WARNING
PAGE 2

You have the right to file a grievance under the Grievance-Arbitration Procedures as set forth in Article 15 of the National Agreement within 14 days of your receipt of this letter.

WARREN SPENCER
SUPERVISOR CUSTOMER SERVICES
U S POSTAL SERVICE
2201 SHORELINE DR
ALAMEDA CA 94501-9998

UNITED STATES POST OFFICE

DATE: September 28, 1995

OUR REF: PM:WJAUGUST:np:94501-9998

SUBJECT: Carrier Re-Training

TO: HAROLD RUCKER
FULL-TIME CARRIER
2201 SHORELINE DRIVE
ALAMEDA CA 94501-9998

You are scheduled to attend three (3) days of re-training on Wednesday, October 4, Thursday, October 5, and Friday, October 6, 1995. You are to report to the following location:

Main Office Station
1025 Nevin Avenue
Richmond CA 94801

Time: 7:00AM
Instructor: Steve Langford

Directions to the Main Office: Take I-80 to MacDonald Avenue West Exit. MacDonald Avenue to 11th Street, turn right to Nevin Avenue (1 block). Post office is on the corner. Entrance around the back of the facility.

William J August

WILLIAM J AUGUST
POSTMASTER
2201 SHORELINE DRIVE
ALAMEDA CA 94501-9998

PROOF OF SERVICE AND PERSONAL DELIVERY

I, the undersigned, declare that on May22, 2000, I have served on every person required to be served, by depositing an envelope containing the document **FIRST AMENDED COMPLAINT RACE, COLOR AND GENER DISCRIMINATION AND RETALIATION FOR FILENTG PRIOR DO COMLAINTS AND PURSUING JUDICIAL REMEDY** in the United States mail properly addressed to each of tem and with first-class postage prepaid.

United Sates Postal Service
Law Department
Attn. Micheal Propst
577 airport Blvd., 200
Burlingame, CA 94010-2040

I served personally devlived a copy of the above named document by delivering to and leaving it at the addressed as follows:

U.S. Attorney's Office
Attn: Susan L. Kamlet
1301 Clay Steet, Ste 340S
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and the declaration was executed on May 22, 2000 at Oakland, CA.

HAROLD J. RUCKER, Declarant

DISTRIBUTED
OCT - 8 2002

Supreme Court, U.S.
FILED
OCT 2 2002
CLERK

No. 01-10374

D.C. No. CV-99-03082-CW

IN THE

SUPREME COURT OF THE UNITED STATES

HAROLD J. RUCKER - PETITIONER
(Your Name)

vs.

JOHN E. POTTER, Postmaster General of the U.S. Postal Service; et al., - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITIONER'S REPLY BRIEF

HAROLD J. RUCKER
(Your Name)

419 Darien Avenue
(Address)

Oakland, CA 94603-2121
(City, State, Zip Code)

(510) 632-7727
(Phone Number)

RECEIVED
OCT 8 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

16 pp

PETITIONER'S REPLY BRIEF

Petitioner agrees with the Respondent in that the petition should be granted, but not on the very narrow issue asserted in the Respondent's brief. "Whether the court of appeals erred in dismissing petitioner's complaint because it failed to allege specific facts establishing a prima facie case of discrimination on the basis of race, color, and gender, or of unlawful retaliation under Title VII, 42 U.S.C. 2000e et. seq." (Res. Br., Question Presented) Respondent's brief fails to address the magnitude of the issues involved in this matter. Petitioner, however, would like to address some points in Respondent's brief.

The Supreme Court case cited in the Respondent's brief , Swierkiewicz v. Sorema N.A., 122 S. Ct. 992 (2002) directly addresses two of the petitioner's issues in that Petitioner's Question No. 5. "Whether the District Court was justified in dismissing a discrimination complaint without providing the complainant with an opportunity to conduct meaningful discovery where the primary theory of discrimination is depended upon evidence from the employer to demonstrate motive and intent?" (Pet. Br. Question Presented No. 5) and Petitioner's Question No. 6. "Whether the District Court was justified in dismissing the retaliation claim when the discriminatory actions alleged demonstrate a cognizant pattern of disparate treatment used in conjunction with employment practices and policies that appeared neutral on their face?"

This Court held the following: "This Court has never indicated that the requirements for establishing a prima facie case under McDonnell Douglas also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constric[t] the role

of the pleadings." McDonald v. Santa Fe Trail Transp. Co., 427 U. S. 273, 283, n. 11 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. See, e.g., Scheuer v. Rhodes, 416 U. S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the McDonnell Douglas framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See Trans World Airlines, Inc. v. Thurston, 469 U. S. 111, 121 (1985) ("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending

on the context and were "never intended to be rigid, mechanized, or ritualistic." Furnco Constr. Corp. v. Waters, 438 U. S. 567, 577 (1978); see also McDonnell Douglas, supra, at 802, n. 13 ("[T]he specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations"); Teamsters v. United States, 431 U. S. 324, 358 (1977) (noting that this Court "did not purport to create an inflexible formulation" for a prima facie case); Ring v. First Interstate Mortgage, Inc., 984 F. 2d 924, 927 (CA8 1993) ("[T]o measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate"). Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U. S. 41, 47 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See id., at 47-48; Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U. S. 163, 168-169 (1993).

"The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, Federal Practice and Procedure §1202, p. 76 (2d ed. 1990). Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Brief for Respondent 34-40. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Leatherman, supra, at 168. Furthermore, Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer, 416 U. S., at 236."

As to the Respondent's argument that the Petitioner's complaint was properly dismissed pursuant to the District Court's Order seeking additional factual information, without lifting the stay on discovery as requested by the Petitioner, is also defeated by this Court's holdings in Swierkiewicz v. Sorema N.A., supra.

The remaining issues that the Petitioner has raised in his petition were best but partially addressed by this Court's recent decision in **National Railroad Passenger Corporation v. Morgan, No. 00-1614, Argued January 9, 2002, decided June 10, 2002, 2001-057.**

This Court's analogy in reaching its decision warrants the immediate attention of the Circuit and District Courts to: 1. Aid in the alignment of the Circuit and District Courts in recognizing systematic discrimination that is comprised of formal and informal policies practiced by an employer to select employees for harassment or dismissal for participating in the EEOC complaint process. (Pet. Br. Question Presented No. 1.); 2. Establish guidelines to align the Circuit and District Courts as to how to identify if systematic discrimination is being used by an employer to customize the workforce based upon discriminatory criteria that focuses on specific behavior characteristics of a specific racial group and exploitive gender criteria which adversely impacts individuals of specific racial groups who are less exploitable. (Pet. Br. Question Presented No. 2.); 3. To determine if the District Court is justified in using the criteria of filing a specific number of discrimination complaints against an employer as criteria for ordering a restrictive pre-filing order against an appellant without first considering factors concerning the effectiveness of the EEOC administrative process in resolving EEO complaints at the onset and without determining if the series of complaints filed constitute sufficient evidence of continuing violations of systematic discrimination practiced by the employer. (Pet. Br. Question Presented No. 3.);and 4. Define whether the Circuit and District Courts have a responsibility or duty to allow complainants the opportunity of meaningful and comprehensive discovery into their allegations of discrimination before dismissing their complaints after the Courts are apprised of the EEOC administrative process being compromised and/or rendered ineffective by the systematic failure of personnel of the EEOC administrative process to develop a comprehensive and complete record of the alleged discrimination by failing to interview witnesses for supporting affidavits and

being informed that management used tactics to create a hostile work environment to intimidate employees thereby causing fear of reprisal from management if they provided supportive declarations of discrimination claims to fellow employees. (Pet. Br. Question Presented No. 4).

FILING OF SUCCESSIVE EEO COMPLAINTS REFLECTIVE OF HOSTILE WORK ENVIRONMENT

1. Filing of EEO Charges are Mandatory

This Court has held that the best approach to resolving the question of whether an EEO complaint should be filed pursuant to a multiple or single "unlawful discriminatory act" would best be addressed by strict adherence to the statute governing the filing of EEO complaints under 42 § 5000(e)1, which specifies that "A charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred.*"

This Court reasoned:

"The Courts of Appeals have taken various approaches to the question whether acts that fall outside of the statutory time period for filing charges set forth in 42 U.S.C. § 2000e-5(e) are actionable under Title VII.. While the lower courts have offered reasonable albeit divergent solutions, none is compelled by the text of the statute. In the context of a request to alter the timely filing requirements of Title VII, this Court has stated that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver,* 447 U.S. 807, 826 (1980). In *Mohasco,* the Court rejected arguments that strict adherence to a similar statutory time restriction for filing a charge was "unfair" or that "a less literal reading of the Act would adequately effectuate the policy of deferring to state agencies." *Id.* at 824-825. Instead, the Court noted that [b]y choosing

what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination. *Id.* at 825. Similarly here, our most salient source for guidance is the statutory text. (Footnotes omitted)

Title 42 U.S.C. § 2000e-5(e)(1) is a charge filing provision that "specifies with precision" the prerequisites that a plaintiff must satisfy before filing suit. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). An individual must file a charge within the statutory time period and serve notice upon the person against whom the charge is made. In a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days. A claim is time-barred if it is not filed within these time limits.

For our purposes, the critical sentence of the charge filing provision is: "A charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred.*" § 2000e-5(e)(1) (emphasis added). The operative terms are "shall," "after . . . occurred," and "unlawful employment practice." "[S]hall" makes the act of filing a charge within the specified time period mandatory. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall,' . . . normally creates an obligation impervious to judicial discretion"). "[O]ccurred" means that the practice took place or happened in the past. The requirement, therefore, that the charge be filed "after" the practice "occurred" tells us that a litigant has up to 180 or 300 days *after* the unlawful practice happened to file a charge with the EEOC. (Footnotes omitted)

The critical questions, then, are what constitutes an "unlawful employment practice" and when has that practice "occurred"? Our task is to answer these questions for both discrete discriminatory acts and hostile work environment claims. The answer varies with the practice."

2. Hostile Environment Consist Of Numerous Acts Over Extensive Period Of Time

This Court held in its decision in the Matter of **National Railroad Passenger Corporation v. Morgan,** supra, that a hostile environment claims are "different in kind from disparate acts. There very nature involves repeated conduct.. *See* 1 B. Lindemann & P. Grossman, Employment Discrimination Law 348-349 (3d ed. 1996) (hereinafter Lindemann) ("The repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of its existence"). The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("As we pointed out in *Meritor [Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986),] `mere utterance of an . . . epithet which engenders offensive feelings in a employee,' *ibid.* (internal quotation marks omitted) does not sufficiently affect the conditions of employment to implicate Title VII"). Such claims are based on the cumulative affect of individual acts.

We have repeatedly made clear that although [Title VII} mentions specific employment decisions with immediate consequence, the scope of the prohibition "is no limited to 'economic' or 'tangible' discrimination, " *Harris,* [510 U.S. at 21] (quoting *Meritor Savings Bank, FSB v. Vinson,* [477 U.S.] at 64), and that it covers more than

"terms" and "conditions" in the narrow contractual sense. *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998)). As the Court stated in *Harris*, 510 U.S. at 21 (some internal quotation marks omitted) (quoting *Meritor*, 477 U.S. at 64, in turn quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978)). "Workplace conduct is not measured in isolation. . . ."*Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam). Thus, *Harris*, 510 U.S. at 21 (internal citations omitted).

> In determining whether an actionable hostile work environment claim exists, we look to "all the circumstances," including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id. at 23. To assess whether a court may, for the purposes of determining liability, review all such conduct, including those acts that occur outside the filing period, we again look to the statute. It provides that a charge must be filed within 180 or 300 days "after the alleged unlawful employment practice occurred." A hostile work environment claim is comprised of a series of separate acts that collectively constitute one "unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1). The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

That act need not, however, be the last act. As long as the employer has engaged in

enough activity to make out an actionable hostile environment claim, an unlawful employment practice has "occurred," even if it is still occurring. Subsequent events, however, may still be part of the one hostile work environment claim and a charge may be filed at a later date and still encompass the whole.

It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as have some of the Circuits, that the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct. The statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability. And the statute does not contain a requirement that the employee file a charge prior to 180 or 300 days "after" the single unlawful practice "occurred." Given, therefore, that the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment."

Cognitive Claim Of Hostile Environment Established

In accordance to this Court's holding in **National Railroad Passenger Corporation v. Morgan,** supra, a hostile environment claim can be established through previous alleged discriminatory actions outside the statutory time period for the purpose of assessing liability as long as any act contributing to the hostile environment claim takes place during the statutory time period.

This Court concluded that to establish a claim for a hostile environment may span

days or even years.

Pursuant to this Court's reasoning, Petitioner may form the basis of establishing a "hostile environment" claim. For example, Petitioner began employment with the Postal Service in June, 1991. (FAC pg 2 ¶ 9) Petitioned filed a EEO complaint against a Afro-American female supervisor for calling him a "dumb ass man, stupid and creating a unacceptable and intolerable workplace. (Pet. Br. B4) (Res. App. B. FAC ¶ ¶ 34 and 154) The Circuit and District Courts found that the discriminatory acts complained of were not sufficiently offensive or pervasive enough pursuant to Harris v. Forklift Systems, Inc., supra.

A discriminatory act was not established, however, the event should be considered of such an offensive nature that it would create an atmosphere of tension and suspicion. Coupled to the unsettled atmosphere, was apprehension as to why the Postmaster of the facility had elected not to offer corrective action or respond to the allegations that the Petitioner was being addressed in a demeaning fashion and harassed. Equally suspect and suspicious was the Postal Service election not to investigate the Petitioners claims of discrimination until the matter was remanded back to the Postal Service by the Office of Federal Operations on June 22, 1995 (Pet. Br. B4) (Res. App. B FAC ¶ ¶ 155 and 156) There is also the appearance that the Postmaster condoned and encouraged the female supervisor to behave in an abusive and unprofessional fashion. (Res. App. B. FAC ¶125)

The acts complained of by the Petitioner created a hostile environment whereby each individual act appeared to be retaliatory in nature. (Res. App. B. FAC ¶ ¶ 125 through 133, 146,159, 172 and 173)

Vexatious Litigant Claim Addressed

The Respondent asserts in his brief that the Petitioner has a long history of repetitious vexatious litigation against the Postal Service. (Res. Br. Pg. 9 para. 1) Petitioner strongly objects to the Respondent's characterization. If in fact the EEOC administrative process were functional in addressing EEO complaints in a timely and effective fashion and the EEOC investigative body was thorough in conducting its investigation, the Petitioner would have no need to file any complaints of discrimination in the judicial system. If in fact the Petitioner were given respect as he had given to others, there would be no cause to address any violations of his civil rights.

Following the Office of Federal Operations remand of the Petitioner's complaint for investigation, the Petitioner has had to file an addition of five EEO complaints addressing what appeared to be disparate treatment and retaliatory acts and two tort actions for what appeared to be a blatant failure of Postal Service to address basic human rights. (Res. Br. Pg 9 para. 1)

Respondent's points out that "not one court has found any merit to any of petitioner's claims. Petitioner has had only one complaint go to trial and that particular case was the only case that the EEO investigator did a good job in terms of obtaining evidence, i.e. affidavits, excerpts of pertinent manuals, evaluation records, etc.. Subsequently a complaint was filed in the District Court.

Discover was extremely limited to the point whereby the petitioner could not obtain information from the Postal Service to demonstrate their explanation for using specific job experience criteria that was not in the job announcement or job requirements for selecting candidates for a electronic position was pre-textual and unnecessary. The

matter was decided in favor of the Postal Service. (Res. Br. App. A20, para. 1)

The Petitioner has had to file EEO complaints to address the many flagrant discriminatory acts as best he could under the present ineffective conditions of the EEO Investigative body and EEO administrative process. Upon obtaining right to sue letters, the Petitioner has had to address the very limited or in most cases, no discovery situations presented to him by the District Court.

Petitioner has attempted to hire an attorney at the first onset of what appeared to be discriminatory acts. Of the attorneys that appeared to be qualified to address the matter, non wanted to deal with the Postal Service. There were approximately three that the Petitioner located that would be willing to represent the Petitioner, but all wanted extremely high retainer fees up front. Non of the attorneys stated that the Petitioner's case did not have merit.

Petitioner made several request to the District Courts for an appointment of counsel citing an extensive search and the lack of success. The Petitioner's request was denied in each instance.

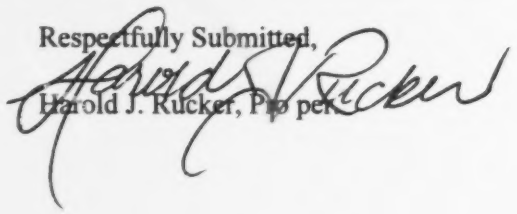
Petition is not an attorney, however, he tries to address adverse situations that present themselves in his life with the resources available to him. If addressing any adverse action requires that the Petitioner pursue the matter in Court, then it shall be pursued in Court. Respondent gives the impression that the Petitioner should not address any wrongs that he perceives by bringing civil action in the appropriate courts.

Petitioner recognizes that there has been a stigma associated with and a prejudice against lay persons who attempt to address their own legal rights for an inordinate amount of time. It's time for a change.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully Submitted,



Harold J. Rucker, Pro per

No. 01-10374

D.C. No. CV-99-03082-CW

IN THE

SUPREME COURT OF THE UNITED STATES

HAROLD J. RUCKER - PETITIONER
(Your Name)

vs.

JOHN E. POTTER, Postmaster General of the U.S. Postal Service; et al.. -- RESPONDENT(S)

PROOF OF SERVICE

I HAROLD J. RUCKER, do swear or declare that on this date, October 2, 20 02, as required by Supreme Court Rule 29 I have served the enclosed PETITIONER'S REPLY BRIEF on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States	United States Attorney
Depatement of Justice, Rm 5614	Attn: Jocelyn Burton
950 Pennsylvania Ave., N.W.	450 Golden Gate Avenue, 10th Floor
Washington, D.C. 20530-0001	San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 2, 20 02

Harold J. Rucker
(Signature)